Marshall Durbin Poultry Company *and* United Food and Commercial Workers International Union, AFL–CIO *and* Billy Johnson. Cases 15–CA–11268 and 15–CA–11372–2

January 11, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On March 4, 1992, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions, a supporting brief, and a brief in answer to the General Counsel's exceptions. The General Counsel filed exceptions and a supporting brief, a brief in answer to the Respondent's exceptions, and a reply brief to the Respondent's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified and to adopt the recommended Order as modified and set forth in full below.

1. The Respondent excepts to the judge's finding that it violated Section 8(a)(3) of the Act by reducing Hattiesburg employees' working hours in the spring of 1990.

The Respondent faults the judge's reasoning on two principal grounds.[3] We find no merit in either one.

The judge credited testimony that agents of the Respondent had revealed the Respondent's intention to reduce the number of chickens processed, i.e., ''the kill,'' at the Hattiesburg plant in order to ''starve'' the employees there and defeat the Union. The General Counsel introduced documentary evidence summarizing the kill at both the Respondent's Hattiesburg facility and its nonunion plant at Jasper, Alabama. This evidence showed a substantial reduction at Hattiesburg, but not at Jasper; and the judge cited this discrepancy in rejecting the Respondent's claim that any reduction at Hattiesburg was attributable to a cold wave affecting chicken breeding areas. The Respondent argues that the Jasper plant is not comparable because there was no showing that it received chickens bred in an area affected by the cold wave. In fact, as the General Counsel correctly argues, the record reflects that the breeding ground for the Jasper plant was encompassed by the same cold wave that supposedly reduced the number of available chickens for Hattiesburg.

The Respondent also argues that the judge erred by focusing on the kill rate, when the key statistic in a reduction-of-hours case is employee hours worked. The Respondent maintains that the judge ignored records that showed that the hours worked ''remained steady in February 1990,'' that reduced hours in March were ''negligible,'' and that reduced hours in April were attributable to two 1-day plant closings. We do not agree with the Respondent's assessment of the evidence. The General Counsel alleged that the statements revealing an intent to reduce the kill rate were made in February, and that the effectuation of that intent occurred in March and April. It is therefore irrelevant whether reductions were shown in February. As for the 1-day plant closings, those were means of reducing employee work hours, not evidence against a finding that hours were reduced. Finally, when we have evidence of an announced intent to discriminatorily reduce production

[1] The Respondent and the General Counsel have each excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We grant the General Counsel's unopposed motion to correct the transcript of the hearing.

The Respondent mentions that a number of unfair labor practices the judge found were not included in the complaint—specifically, that employee Temple received a warning on April 30, that employee Chisholm received a writeup on May 7, and that employees McGilvery and Hayes received warnings on June 18; and that all these actions were taken for discriminatory reasons. We find that these violations were closely related to complaint allegations and were fully litigated. See *Baytown Sun*, 255 NLRB 154 fn. 1 (1981).

We find no merit in the General Counsel's exception to the judge's failure to find that the Respondent violated Sec. 8(a)(1) when Supervisor Billy Johnson told employee Ollie Wilson that he knew that she had attended a union meeting and that she better know what she was doing. This statement was not alleged as a violation in the complaint, and the matter was not fully litigated at the hearing.

In finding that the Respondent unlawfully reduced Cole's and Temple's hours in March 1990, the judge miscalculated the time allotted to employee Bonner who assumed work duties formerly performed by Cole and Temple. The correct amount of time Bonner spent on these duties was 2 hours and 45 minutes. This error does not undermine the judge's conclusion.

[2] The judge failed to include in his discussion any reference to the facts supporting Conclusion of Law 6 that the Respondent violated Sec. 8(a)(1) when Supervisor Robert Gaines informed employees that their raises were withheld because of their union activities. Employee Eloise Phillips testified that employee Ruby Walker asked Gaines why the Hattiesburg employees had not received a raise when the other plants had received one. Gaines responded that it was ''thanks to the union you all didn't get a raise.''

[3] The Respondent also claims that the allegation was untimely and not closely related to any prior charge allegations. The judge, in an unpublished ruling, held that the reduction-in-hours allegation ''may be closely related to the allegations previously pleaded.'' We find no merit in the Respondent's contention. As the Board held in *Well-Bred Loaf*, 303 NLRB 1016 fn. 1 (1991), a sufficient nexus between the charge and the complaint is established when all the allegations involve ''part of an overall plan to resist organization,'' citing *Nickles Bakery of Indiana*, 296 NLRB 927, 928 fn. 7 (1989). That is the case here.

and evidence of such reduced production, we decline to treat even minor reductions in employee working hours as merely ''negligible.'' We leave to compliance a determination of the precise amount of lost working time attributable to the reduction in kill.

2. The General Counsel excepts to the judge's failure to address a complaint allegation that the Respondent violated Section 8(a)(1) when, in mid-April 1990,[4] its supervisor, Bobby Boutwell, told employee Ruth Powell that he thought they were on short hours because of the Union. The General Counsel argues that the record establishes such a violation. We find merit to this exception. Powell's testimony regarding this conversation was uncontradicted. Boutwell's statement placing the blame on the Union for a reduction in working hours is coercive and therefore violated Section 8(a)(1). *Bay State Ambulance Rental*, 280 NLRB 1079, 1084 (1986).

3. The General Counsel excepts to the judge's finding that the Respondent did not violate the Act by withholding a wage increase from Hattiesburg employees until after the Union withdrew its petition for an election. We find merit to this exception.

In February or March 1990 employees at all the Respondent's plants except the Hattiesburg facility received a wage increase. The Union withdrew its election petition on May 3, 1990. Subsequently, Hattiesburg employees received an increase.

According to the vice president of processing, Scott Varner, in late 1989 or early 1990 Respondent's management discussed giving a wage increase to employees at all six of its plants, including the Hattiesburg plant, but later, on the advice of counsel, the Respondent decided to withhold the increase from Hattiesburg employees because of the Union. In a February 26, 1990 meeting with Hattiesburg employees, Varner stated that the Respondent could not give them a raise because of the Union. After the Respondent implemented the wage increase at other locations, Varner told Supervisor Billy Johnson that he hoped Hattiesburg employees were ''giving [union activists] Temple and Cole hell'' about the loss of the wage increase. In addition, as noted in footnote 2, supra, Supervisor Gaines told employees that it was ''thanks to the union you all didn't get a raise.''

It is well established that as a general rule an employer must grant benefits ''as he would if a union were not in the picture.'' *Great Atlantic & Pacific Tea Co.*, 166 NLRB 27, 29 (1967). Here, the testimony recited above clearly establishes that because of the union campaign, the Respondent withheld a wage increase from the Hattiesburg employees.

The judge nevertheless found that no violation of the Act occurred, apparently reasoning that this case fell within a limited exception the Board has fashioned for employers whose pattern of granting wage increases has been haphazard. See *H.S.M. Machine Works*, 284 NLRB 1482, 1484 (1987). However, in order to fall within the exception to the general rule, an employer, among other things, must not seek ''to put the onus for [delaying the wage increase] on the union.'' *Borman's, Inc.*, 296 NLRB 245, 248 (1989). We find that Varner's statement that he hoped employees were ''giving [union activists] hell'' and Gaines' statement that ''thanks to the Union you all did not get a raise'' show that the Respondent used the wage withholding as a campaign tactic and sought to place the onus for the withholding on the Union. Accordingly, we conclude, contrary to the judge, that the Respondent's withholding of a wage increase from the Hattiesburg employees violated Section 8(a)(3) and (1) of the Act.[5]

4. We agree with the judge that the Respondent violated Section 8(a)(1) by discharging Supervisor Billy Johnson for refusing to commit unfair labor practices. For the following reasons, however, we find that Johnson is not entitled to reinstatement and full backpay.

The Respondent claimed that it discharged Johnson in May 1990 for a specific incident of sexual misconduct at work. The judge found the incident did not occur. Subsequent to the discharge, Johnson filed a charge with the Equal Employment Opportunity Commission. In the course of investigating the charge, the Respondent learned that Johnson had previously engaged in repeated on-the-job sexual misconduct, which the judge found did occur.

The judge found that Johnson's course of conduct of sexual harassment warranted barring his reinstatement. But, because he found the Respondent tolerated sexual misconduct by employees and other supervisors, the judge recommended that Johnson receive backpay until he obtains substantially equivalent employment elsewhere. The judge recommended this unusual remedy in order to make ''both the Respondent and Johnson . . . shoulder responsibility for their conduct.''

In its exceptions, the Respondent contends, inter alia, that even if the Board upholds the judge's finding that Johnson's discharge was unlawful, the judge erred as a matter of law in holding that Johnson is entitled to full backpay. The Respondent also argues that the judge erred as a matter of fact in finding that the Respondent tolerated similar sexual misconduct. We find merit in the Respondent's contentions.

As the Respondent points out, the judge's finding that while reinstatement is not warranted, Johnson is entitled to full backpay is contrary to our decisions in

[4] All subsequent dates are in 1990 unless indicated otherwise.

[5] In light of this conclusion, we find it unnecessary to pass on the General Counsel's claim that the judge erred in failing to find that Varner waived the attorney-client privilege by testifying, on direct examination, about advice he received from the Respondent's attorney regarding withholding the wage increase from Hattiesburg employees.

John Cuneo, Inc., 298 NLRB 856, 856–857 (1990), and *Axelson, Inc.*, 285 NLRB 862, 866 (1977). Under this precedent, if an employer satisfies its burden of establishing that the discriminatee engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date that the employer first acquired knowledge of the misconduct.[6]

Applying this precedent, we conclude that the Respondent has satisfied its burden. Since 1989 the Respondent's upper management has had a policy of not tolerating sexual misconduct by its supervisors. The key individuals responsible for administering this policy are located at the Respondent's corporate headquarters in Birmingham, Alabama. These corporate officials are Scott Varner, senior vice president, and Robert Keith, assistant director of human resources.

The record shows that when allegations of sexual misconduct by supervisors are brought to the attention of these individuals, they promptly investigate the matter and take appropriate disciplinary action, including discharge. Thus, in 1989 when Assistant Director of Human Resources Keith received information of sexual harassment allegations against Supervisor John Hession, Keith went to the Hattiesburg plant to investigate. When Hession admitted the allegation was true, Keith terminated him immediately.

We do not adopt the judge's finding that the Respondent tolerated sexual misconduct by its supervisors. The incidents relied on by the judge either occurred before 1989 or were not shown to have been brought to the attention of the individuals listed above. Because the record shows that these high-level officials are the effective decisionmakers with respect to the Respondent's sexual harassment policy, any disparate treatment analysis must focus on their handling of misconduct similar to that of Supervisor Johnson.

Here, there is no evidence that the Respondent's corporate management tolerated sexual harassment by supervisors. To the contrary, there is unrebutted evidence that upper management terminated another supervisor for the same type of misconduct. Accordingly, under *Cuneo* and *Axelson*, the proper remedy is a make-whole order from the time of Johnson's unlawful discharge to the time the Respondent learned of the sexual misconduct that the judge found had occurred.[7]

AMENDED CONCLUSIONS OF LAW

1. Insert the following as Conclusion of Law 9 and renumber the remaining paragraphs accordingly.

''9. Respondent violated Section 8(a)(1) of the Act through its supervisor, Bobby Boutwell, by telling employee Ruth Powell in April 1990 that they (the employees) were on such short hours because of the Union.''

2. Substitute the following for renumbered Conclusion of Law 11.

''11. Respondent violated Section 8(a)(3) and (1) of the Act in February 1990 by delaying the grant of a wage increase to Hattiesburg employees because of their support for the Union.''

ORDER

The National Labor Relations Board orders that the Respondent, Marshall Durbin Poultry Company, Hattiesburg, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their union activities and those of their fellow employees.

(b) Threatening its employees with the futility of their support for the Union, plant closure, discharge, and loss of wages and benefits, because of their support for the Union.

(c) Threatening its employees with following up on their work and planting company property on them in order to discharge them.

(d) Soliciting its employees to abandon their support for the Union with the promise that they would get back in the good graces of their Employer, in reference to animus toward them by the Employer because of their past support of the Union and/or testimony given on behalf of the Union at a National Labor Relations Board representation hearing.

(e) Threatening its employees with discharge and with calling the sheriff if they remain on the premises after their working hours in order to discourage their support of the Union.

(f) Issuing disciplinary warnings to its employees because of their support of the Union and/or because of their giving testimony on behalf of the Union at the National Labor Relations Board representation hearing.

(g) Telling its employees that they were working shorter hours because of the Union.

(h) Transferring its employees to more onerous work and harassing its employees because of their support of the Union and/or because of their giving testimony on behalf of the Union at a National Labor Relations Board representation hearing.

(i) Reducing the work hours of its employees because of their support of the Union and/or because of their giving testimony at a National Labor Relations Board representation hearing.

(j) Discharging its employees because of their support of the Union and/or because of their giving testi-

[6] We note that *Axelson* overruled cases inconsistent with this remedial approach. *Hillside Avenue Pharmacy*, 265 NLRB 1613 (1982), cited by the judge, addresses a different issue, i.e., employee misconduct directly precipitated by the employer.

[7] The specific backpay period and the consequent amount owed to Johnson are matters that we leave to the compliance stage of this proceeding.

mony on behalf of the Union at a National Labor Relations Board representation hearing.

(k) Engaging in disparate treatment of its employees who support the Union by permitting the wearing of antiunion insignia while prohibiting the wearing of prounion insignia and by threatening its employees with adverse consequences if they continue to wear prounion insignia.

(l) Barring prounion employees from the breakroom and nonwork areas of the plant and from the parking lot after the conclusion of their work hours while permitting other employees to remain in these areas after the conclusion of their work hours.

(m) Discharging its supervisors because of their refusal to commit unfair labor practices.

(n) Delaying the grant of a wage increase to its employees because of their support of the Union.

(o) Threatening its supervisors and/or employees with discharge in order to restrain them from testifying before the National Labor Relations Board.

(p) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawful warnings issued to its employees Barney Chisholm, Myrtle Temple, Rebecca Cole, Patricia Walker, Charlene Ann Jones, Gussie McGilvery, and Cecilia Hayes.

(b) Rescind its unlawful discharges of its employees Charlene Ann Jones and Ruth Powell and its unlawful transfer and reduction of hours of its employee Ruth Powell and offer them full reinstatement to their former positions (the net room position in the case of Ruth Powell), or to substantially equivalent positions if their former positions no longer exist and make them whole for all loss of wages and benefits with interest as set out in the ''Remedy'' section of the administrative law judge's decision, and restore all rights and privileges including seniority to them.

(c) Make whole Billy Johnson for his lost earnings and benefits from the date of his discharge until the date on which the Respondent first learned of his prior misconduct constituting a lawful basis for discharge, with interest thereon to be computed in the manner set forth in the ''Remedy'' section of the administrative law judge's decision.

(d) Make whole its employees for all loss of earnings and benefits, with interest thereon as computed in the ''Remedy'' section of the administrative law judge's decision, as a result of the delay in giving the Hattiesburg employees a wage increase.

(e) Remove from its files any reference to the unlawful actions taken against its employees Barney Chisholm, Myrtle Temple, Rebecca Cole, Patricia Walker, Charlene Jones, Ruth Powell, Gussie McGilvery, and Cecilia Hayes, and its former Supervisor William (Billy) Johnson and inform them in writing that this has been done and that these unlawful acts will not be used against them in any manner.

(f) Make whole employees Myrtle Temple and Rebecca Cole for all loss of wages and benefits sustained by them with interest as described in the ''Remedy'' section of the judge's decision as a result of the unlawful reduction in their work hours.

(g) Make whole its employees at the Hattiesburg plant for all loss of earnings and benefits with interest as described in the ''Remedy'' section of the judge's decision as a result of the unlawful reduction in their work hours.

(h) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(i) Post at its facility in Hattiesburg, Mississippi, copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(j) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees concerning their union activities and sympathies and those of their fellow employees.

WE WILL NOT threaten our employees with plant closure, discharge, loss of wages or benefits, withholding pay raises, calling in the sheriff, and the futility of their support of the Union.

WE WILL NOT threaten employees with following up on their work and planting company property on them in order to discharge them.

WE WILL NOT tell our employees that they are working shorter hours because of the Union.

WE WILL NOT delay giving our employees a wage increase because of their support for the Union.

WE WILL NOT issue disciplinary warnings to, discharge, transfer to more onerous positions, harass or reduce the work hours of our employees, in our plant and adjacent premises because of their support of the Union and/or because of their giving testimony on behalf of the Union at a representation hearing conducted before the National Labor Relations Board.

WE WILL NOT engage in disparate treatment of our employees by prohibiting them from wearing prounion insignia while permitting other employees to wear antiunion insignia, by threatening employees with adverse consequences if they continue to wear antiunion insignia, and by barring prounion employees from the breakroom and nonwork areas of the plant and from the parking lot after the conclusion of their work hours while permitting other employees to remain in these areas after the conclusion of their work hours.

WE WILL NOT solicit our employees to abandon their support of the Union by promising that they will get back in the good graces of the Employer if they do so.

WE WILL NOT discharge our supervisors because of their refusal to commit unfair labor practices.

WE WILL NOT threaten our supervisors and/or employees with discharge in order to restrain them from testifying before the National Labor Relations Board.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our warnings issued to our employees Barney Chisholm, Myrtle Temple, Rebecca Cole, Patricia Walker, Charlene Ann Jones, Gussie McGilvery, and Cecilia Hayes.

WE WILL rescind our reduction of work hours, and transfer of our employees Ruth Powell to more onerous work and our discharge of our employees Ruth Powell and Charlene Ann Jones and will offer them full reinstatement to their former positions (the net room position in the case of Ruth Powell) or to substantially equivalent positions if their former positions no longer exist and will make them whole for all loss of wages and benefits sustained by them as a result of our unlawful actions taken against them, with interest, and will restore to them all rights and privileges previously enjoyed by them.

WE WILL rescind our reduction of the work hours of our employees Rebecca Cole and Myrtle Temple in March 1990 and thereafter and of our employees at the Hattiesburg, Mississippi plant in the spring of 1990 and will make them whole for all loss of earnings and benefits sustained by them as a result thereof, with interest.

WE WILL make Billy Johnson whole for any loss of earnings and benefits sustained by him as a result of his discharge, with interest, from the date of his discharge until the date on which we learned he had engaged in prior misconduct.

WE WILL make our employees whole for any loss of earnings and benefits, with interest, because we delayed giving them a wage increase.

WE WILL remove from our files any reference to the transfer of Ruth Powell, warnings issued to Barney Chisholm, Myrtle Temple, Rebecca Cole, Patricia Walker, Charlene Jones, Gussie McGilvery, and Cecilia Hayes, to the discharges of Ruth Powell, Charlene Jones, and William (Billy) Johnson and will inform them in writing that this has been done and that the transfer, warnings and discharges will not be used against them in any manner, because of their support of the Union and or because of their giving testimony in a proceeding before the National Labor Relations Board or their engagement in other protected concerted activities or because of their refusal to commit unfair labor practices.

MARSHALL DURBIN POULTRY COMPANY

David A. Nixon, Esq., for the General Counsel.
Sid Lewis, Esq., and *Elmer E. White III, Esq. (Kullman, Inman, Downing & Bonte)*, for the Respondent.
Hubert Coker, of Fulton, Mississippi, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on 7 separate days between January 14 and April 25, 1991, at Hattiesburg, Mississippi, pursuant to an amended consolidated complaint issued by the Regional Director of Region 15 of the National Labor Relations Board (the Board) on December 28, 1990, as subsequently amended and a further comprehensive consolidation of complaint allegations filed by counsel for the General Counsel on April 4, 1991, and is based on various charges and amended charges filed by the United Food and Commercial Workers International Union, AFL–CIO (the Union or the Charging Party) and on a charge in Case 15–CA–11372–2 filed by

Billy Johnson, an individual, on October 9, 1990. The original charge in Case 15–CA–11268 was filed by the Union on June 25, 1990, with an amended charge filed by the Union on December 26, 1990, a second amended charge filed by the Union on January 11, 1991, a third amended charge filed by the Union on January 23, 1991, a fourth amended charge filed by the Union on January 31, 1991, and a fifth amended charge filed by the Union on February 6, 1991. The amended consolidated complaint alleges that Respondent Marshall Durbin Poultry Company (the Respondent) committed various violations of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). The complaint is joined by the answer of Respondent in which it denies the commission of any violations of the Act.

On the entire record in this proceeding, including my observation of the witnesses who testified and after due consideration of the positions of the parties and briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that at all times material Respondent has been a Delaware corporation, with an office and place of business in Hattiesburg, Mississippi, where it has been engaged in the processing and nonretail sale of poultry products, that during the 12-month period ending July 31, 1990, Respondent, in the course and conduct of its business operations, purchased and received at its facility in Hattiesburg, Mississippi, products, goods, and materials valued in excess of $50,000 directly from points outside the State of Mississippi and is now and has been at all times material an employer engaged in commerce within the meaning of Section (2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that the Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.[1]

III. THE ALLEGED UNFAIR LABOR PRACTICES

In early 1989 the Union commenced an organizational campaign among Respondent's employees at its Hattiesburg, Mississippi facility. The violations of the Act are alleged to have taken place since January or early February 1990 and up until the time of the most recent complaint allegations. During this period Respondent is alleged to have committed various violations of Section 8(a)(1), (3), and (4) of the Act. The General Counsel alleges in its comprehensive consolidated complaint, Respondent admits and I find that at all times material the following individuals were supervisors of Respondent within the meaning of Section 2(11) of the Act: President Marshall Durbin, Plant Manager Malcolm McDonald, Senior Vice President Scott Varner, Vice President Fincher Allen, Assistant Director Human Resources Robert Neil Keith, Personnel Manager Mel Dupre, Assistant Personnel Manager Cathy Obery, Sales Manager Levon Williamson, Assistant Sales Manager Allen Wilburn, Sales Secretary Susan White, Supervisors Jim Sanders, James Gurlach, and Otha Hinton, Head Foreman Ken Chandler Raymond Fleming, Foremen Billy Johnson, Wayne Stewart, Bill Helton, Ora Mae Marshall, Robert Boutwell, Junior Madison, Robert Gaines, Tim Thorne, Al Bessie, Al Mason, Scott Seabrook, Billy Ray Barnes, and Chuck Halbrook.

In March 1989 several of the Respondent's employees (Myrtle Temple, Rebecca Cole, Ollie Wilson, Ruth Powell, and Cynthia Bonner) met with a union representative at an old fishing camp to discuss organizing a union among Respondent's employees at Respondent's Hattiesburg, Mississippi chicken processing plant. Subsequently, the Union filed a petition for an election and a hearing was held on February 22, 1990, at which employees Myrtle Temple, Rebecca Cole, Charlene Ann Jones, Ruth Powell, and Patricia Walker appeared and testified on behalf of the Union. An election was ordered to be held on May 3, 1990. However, prior to the election, the Union withdrew its petition and the election was canceled. The complaint alleges numerous violations of the Act by the Respondent including interrogation, threats, solicitation of employees to vote against the Union, disciplinary warnings, assignment to more onerous work, discharges, a constructive discharge, reduction of working hours and overtime, and withholding of wage increases. The General Counsel contends that since Respondent became aware of the union campaign and the supporters of the Union among its employees it undertook an unlawful campaign to defeat the Union in the upcoming election, which encompassed the various complaint allegations and which targeted and carried out unlawful retaliatory actions against those employees who had been identified as union supporters and had testified on the Union's behalf at the representation hearing and also included the discharge of its supervisor, William (Billy) Johnson, for his refusal to commit unfair labor practices. The Respondent denies all violations of the Act and contends that each of the various actions taken by it were taken for sound business reasons and were not motivated by any unlawful motive proscribed by the Act.

Interrogation and Threat of Ruth Powell by Plant Manager Malcolm McDonald

Ruth Powell testified that in January or February 1990, Plant Manager Malcolm McDonald talked to her in the net room. McDonald said they had always been friends and asked if she could tell him about the union talk going on in the plant. She told him she was sorry but she could not give him any information on that. He had his opinion, she had one, and the employees on the line had one and that she couldn't help him. She testified further that 2 days later McDonald told her that he thought they had a good company and asked whether she remembered when he had been gone from the plant for 17 weeks. She said she did and he said he was in another one of the Company's plants and they had a union there and that union had left the plant running and if one came in the Hattiesburg plant, it would leave here running. McDonald testified he did not recall a conversation with Powell in January 1990 in which he inquired about union talk in the plant. He testified he talked with Powell but did not ask questions or make inquiries of her. He just let

[1] R. Exh. 57 is received and made a part of the record.

The General Counsel's and Respondent's motions to correct their briefs and the General Counsel's motion to substitute new pages 125, 126, and 127 for original pages in its brief are granted.

The General Counsel's motion to strike portions of Respondent's brief is denied.

her know the Company did not feel the Union was in the best interest of the employees and that she did not agree or disagree.

I credit the specific testimony of Powell over that of McDonald and I find that McDonald's questioning of Powell concerning the Union constituted unlawful interrogation and that his comment to her that the Union would leave the plant running as had another union at another plant was a threat of the futility of the employees' support of the Union. I find that both the interrogation and threat were violative of Section 8(a)(1) of the Act.

Interrogation and Threat of Rebecca Cole by McDonald

Rebecca Cole, a scale operator, testified that on September 10, 1989, McDonald told her there were rumors of a union trying to come in. She replied there were rumors of one kind or another up and down the plant. He then asked if she knew anything about the rumor and she replied nothing than what she had heard about the rumor. He then said she had better be careful and that if she got mixed up in the union, she might be fired.

Cole testified further that on February 19, 1990, McDonald called her into his office and said he wanted to talk to her about the Union, how bad it would be for the employees and the Company, and that if the Union came in the parties would have to go to the bargaining table and the Company would not have to agree to anything and if the employees went on strike, they would not get a paycheck, their insurance would be no good and they could not get food stamps. He asked if she had received any promises or guarantees and she replied she had not. Cole testified further that on February 28, 1990, McDonald told her in his office that she had better be careful about this union stuff or she would lose her job. She could be fired.

McDonald testified he had a conversation with Cole on September 10, 1989, and he told her the Company did not want a union and she listened but did not have much response. McDonald testified he had a conversation with Cole in his office on February 19, 1990, as he had received reports that Cole was soliciting authorization cards for the Union while she was on the job working. He called her into the office and told her of these reports and does not recall if she admitted it or not. He told her she could get in trouble doing this while she was working. She said, ''From this day on you won't hear any more about it,'' and he has not. He denied at any time in 1989 or 1990 ever telling Cole that Durbin would not agree to any union proposals. He has never threatened Cole or anyone else associated with the Union. He does not recall a third conversation with Cole on or about February 28, 1990.

I credit the specific testimony of Cole as set out above over that of McDonald. While the September 1989 interrogation and threat were time barred insofar as a finding of a violation, they constitute evidence of Respondent's animus to the Union and its supporters. I find the interrogation of Cole and threat of futility of the employees support of the Union on February 19, 1990, and the threat of February 28, 1990, that Cole could lose her job because of her support of the Union were violative of Section 8(a)(1) of the Act.

Johnson's Conversations with Cole and Temple in February and May 1990

Cole testified that in late April or early May her supervisor, William (Billy) Johnson, told her McDonald had sent him to the cooler to check boxes of chickens weighed by her and Temple to find fault with their work as a way to get rid of them. Cole testified that on another occasion in April Johnson told her that Personnel Manager Mel Dupre had asked him to plant something on her and Temple so that when they left the plant, the guard would stop them and they could be discharged for stealing. She also testified that in early May Johnson told her that McDonald had told him to make a list of names of employees wearing union buttons and to turn it in and that McDonald wanted him to harass them.

Temple testified that in late February Johnson came to her work station and told her to be careful as McDonald had sent him to the cooler to go behind her and Cole's work and try to find fault with their weighing so that Respondent could write them up so they could be discharged. He told her ''You and Becky [Cole] watch your ass.'' On April 20 Johnson told her to be careful as Dupre had called him into his office and wanted him to plant something on her and Cole so the guard could find it when they left the plant so they could be discharged. She thanked Johnson and told him she would be careful. On May 3 Johnson told her McDonald had called him into his office and told him to see how many employees on his line were wearing union buttons and to take down their names and turn them into the office as they (management) were going to find a way to ''get rid of their damn asses.'' She told Johnson the prounion employees had a right to wear the ''workers helping workers'' buttons if the antiunion employees could wear ''Hell No'' buttons. She testified that the antiunion buttons had been worn for 2 months whereas she wore her union button only 2 weeks.

Johnson testified that in early March 1990 McDonald told him to go out in the plant and harass Cole and Temple and check their scales and boxes and do anything to find something wrong in order to give them a reprimand and to discharge them if he found enough. Johnson checked three boxes of chicken off Cole and Temple's lines but found nothing wrong and wrote this on a piece of paper and gave it to McDonald. Johnson testified that on April 20 Dupre waved him into his office and told him, ''We need to plant something on Becky [Cole] and Merle [Temple] so we can call the guard and have him check them so we can fire them for stealing.'' He told Dupre he could not do that so he would have to find someone else and he left the office. Johnson also testified to a conversation with McDonald in mid-April when he had gone to McDonald's office for a social visit. He asked McDonald what would happen to Temple and Cole and all the other prounion employees ''after this union mess was over.'' McDonald leaned back in his chair and said ''the company had built these peoples' houses, bought them cars, fed their children and bought their clothes and that the company was going to get rid of every one of them.'' McDonald further said the Company had to be careful how they did it and that they wanted to move Temple and Cole off their scales but Hank (the Company's attorney) said they had to wait until he gave them the word. Johnson also testified that on May 3 about 8:30 a.m. in McDonald's office, McDonald told him that Varner had said a number of em-

ployees on his line were wearing union buttons. McDonald said he thought about six employees were wearing them and told Johnson to go out on his line and write their names down and bring the list back to him because ''he wanted to know who the son of bitches were.'' He then went to Temple, Cole, and McGilvery and wrote their names down on a list and explained what McDonald wanted. He wrote down the names of those who refused to take the buttons off. He did not write down the names of those who took the buttons off. He then took the list into McDonald's office and laid it on his desk as McDonald was on the telephone. McDonald denied having made any of the above statements to Johnson as did Dupre. Both McDonald and Varner testified they had been ordered by the United States Department of Agriculture to remove the buttons and that all buttons were ordered by Respondent to be removed regardless of whether pro or antiunion. McDonald acknowledged a conversation with Johnson in which McDonald placed in late 1989 or early 1990 concerning Johnson checking the weights of chickens weighed by Cole and Temple in which he told Johnson to check the weights and testified Johnson did so and reported back that everything was okay. McDonald contended that such checking is routine. McDonald denied having any hit list of any employees Respondent wanted to discharge because of union activities. He discussed the Union with Johnson many times but does not recall any specific conversations.

I credit the specific and detailed testimony of Temple, Cole, and Johnson as set out above. I find that their testimony was mutually corroborative and consistent throughout, with the exception of the date placed by Cole of the threat by Johnson, I find that this threat actually occurred in February or March 1990. Although it is clear that Johnson's statements in each instance were intended to warn and protect Cole and Temple they were nonetheless violative of Section 8(a)(1) of the Act. I thus find that by the threats issued by Johnson to Cole and Temple in February or March 1990 that McDonald had told him to check their work in order to find a reason to fire them, by the threats issued by Johnson to Cole and Temple in April 1990 that Dupre had told him to plant company property on Temple and Cole in order to fire them, by the threat issued by Johnson to Cole and Temple in May 1990 concerning McDonald's order to take down the names of employees wearing prounion buttons and turn them into McDonald, Respondent violated Section 8(a)(1) of the Act. I further find that by the disparate treatment accorded employees who wore prounion buttons while tolerating the wearing of antiunion buttons, Respondent violated Section 8(a)(3) and (1) of the Act. In this regard, I do not credit the testimony of McDonald and Varner that the wearing of buttons was discontinued solely because of the orders of the United States Department of Agriculture.

Systematic Interrogation of Employees

Johnson and former Supervisors James Gurlach and Robert Boutwell testified that in March 1990 Senior Vice President Scott Varner, Assistant Director of Human Resources Neil Keith, and Vice President Fincher Allen met with Respondent's supervisors and instructed them to interrogate the employees under their supervision concerning their union sympathies and to write their responses in spiral notebooks supplied by Respondent. All three supervisors did so and reported the responses back to Respondent in individual meetings with Varner, Keith, and Allen, and Varner used a computer printout sheet with the employees' names thereon and assigned them ratings based on their pro or antiunion sympathies. Johnson produced at the hearing his original notebook with the entries on which he had spilled ink and from which he had copied the notations to a new notebook which he turned in to Respondent's management. Varner denied having ordered supervisors to interrogate the employees. Keith, who testified on other matters, was not questioned concerning this allegation and Allen, although present at the hearing, was not called to testify.

I find that Respondent through its agents, Varner, Keith, and Allen, did direct its supervisors to interrogate the employees under their immediate supervision concerning their union sympathies and report the information obtained back to them and that Supervisors Johnson, Gurlach, and Boutwell did so. Initially I credit the testimony of Johnson, Gurlach, and Boutwell whose testimony I found to be specific, forthright, and mutually corroborative. It should also be noted that I found Boutwell's testimony to be particularly impressive. Here was a supervisor who had only the day prior to testifying resigned his job with Respondent to accept another position and who was as noted by the General Counsel in his brief, reluctant to testify and who took great pains in his testimony not to cast any unfair light on the Respondent's efforts to suppress the union campaign but who nonetheless testified in a most candid manner. Boutwell testified with specificity about the orders he received to interrogate his employees and to report back their sympathies to Respondent's management. His testimony as well as that of Gurlach (who concededly was discharged as a supervisor) was convincingly corroborative of Johnson's testimony concerning the systematic interrogation of Respondent's employees. I do not credit Varner's denial and find as asserted by the General Counsel that Respondent's failure to question Keith or to call Allen to the stand concerning this matter supports the inference that they would not have corroborated Varner's denial thereof. I thus conclude that the Respondent violated Section 8(a)(1) of the Act by its systematic interrogation of its employees in March 1990 concerning their union sympathies.

Alleged Threats by Varner at Meetings with Employees

Rebecca Cole testified she attended a meeting held by Respondent with its employees in second processing at which Vice President Scott Varner spoke and said that if the Union came in the parties would have to go to the bargaining table and the Respondent would not have to agree to anything and if the employees went on a strike, they would not receive their pay or food stamps or unemployment. He also told the employees that although they were due for a raise, they would not get one because of the Union and that at the bargaining table, they would lose their vacation and holidays.

Myrtle Temple testified she attended a February 26, 1990 meeting of all packing (second processing) employees with Vice President Varner who told the employees Respondent could not give them a raise because of the Union. Varner also said that if the Union came in the plant would close. He also said Marshall Durbin (the owner) would have the last say or bottom line and that the Respondent could not give the employees a better insurance policy because of the Union. Varner also said he would not have a third party (the

Union) in his plant. Varner also said that if the employees went on strike, they could not draw unemployment or get food stamps and would not have any insurance. He also told them if the Union came in, they would start from scratch and could go back to $3.35 an hour (minimum wage) and that they would lose their vacation and holiday pay.

Eloise Phillips, a 20-year employee who works in the packing department, testified she attended a meeting held by Varner in March 1990 with the employees. Varner told the employees that if the Union came in, they would be taking the employees' money for dues and all the employees' benefits would be taken back and they would start from scratch. She further testified that Varner said that if the employees went on the picket line, they could be replaced and could not be sure they would get their jobs back and that before Respondent would let a third party came in, they would close the plant down.

Varner testified he read from a script prepared by Respondent's counsel and did not deviate from it and denied making any threats of loss of pay, raises or benefits, plant closings, or futility of support for the Union or discharge.

Charlene Jones testified that on April 13, 1990, she attended a meeting held by Vice President Scott Varner with the employees on the frontlines, the picking line, the backline, and the rehang area. Varner told the employees the Union was trying to come in and if it did, the employees would have to start from a blank piece of paper and could not get a raise. The parties would be deadlocked and the employees would not have any benefits. Varner testified he read from a text submitted as evidence at this hearing.

I credit the foregoing testimony of Cole, Temple, Jones, and Phillips and find that Varner threatened the employees with futility of their support for the Union, loss of benefits, loss of pay raises and plant closure if they continued to support the Union and that Respondent violated Section 8(a)(1) of the Act thereby.

Solicitation by Johnson of Employees to Abandon the Union

Johnson testified that on March 1, 1990, employee Ollie Wilson who was supervised by him in the box room (where boxes are made) came to him and told him she had heard Respondent's management had a hit list and that he replied he did not know that this was true. Wilson went on to say she wanted to withdraw her support of the Union. She had signed the petition for the Union. Johnson testified he talked to Plant Manager Malcolm McDonald who checked with Vice President Scott Varner and then told Johnson to tell Wilson and other employees who she had indicated also wanted to withdraw their support of the Union, to write a letter to the Union stating they did not understand what they were signing and that they wanted to withdraw their support for the Union and to send the letter registered mail return receipt requested. Johnson instructed the employees to give him the receipt which he would give to McDonald so the employees could get back in Respondent's good graces. On one occasion in March Varner asked him how things were going in this regard and Johnson replied ''great'' and told him he had several letters. He then asked Varner what good it would do to have the employees sign the letters. Varner replied he just wanted to know who the ''sons of bitches'' were and that he wanted to use Johnson's department which was the largest in the plant as a sample of employee opinion.

McDonald acknowledged having received copies of receipts from Johnson concerning the matter but denied giving Johnson any instructions in this regard. Varner testified that on or about March 1, 1990, he had questions from supervisors and employees about what the employees should do to remove their names from anything they had signed and ''we'' told them to contact the Union. In response to questions as to how the employees would know their names were removed, ''We'' told them to get ''signed postage.'' He acknowledged a conversation with Johnson in March concerning this wherein he told Johnson the employees would have to request from the Union that their names be removed. He denied telling Johnson to tell the employees to obtain a postal receipt which would be placed in their personnel files.

I credit the testimony of Johnson over that of McDonald and Varner and find that although Wilson approached Johnson initially, he went further than merely giving her information. On Varner's orders as conveyed by McDonald, he told the employees to obtain receipts of their mailing of letters to the Union withdrawing their support in order to get back in Respondent's good graces. This constituted solicitation of the employees abandonment of the Union with an implied promise of job security if they do so or otherwise stated a reprieve from adverse consequences or unspecified reprisals that might flow from not being in Respondent's good graces and was violative of Section 8(a)(1) of the Act.

March 15, 1990 Solicitation by Supervisor Johnson

Rebecca Cole testified that on March 15, 1990, her supervisor, William (Billy) Johnson, said he would be glad when all of this union stuff is over. She said she would also. He said that if the employees went on strike it would be hard on the single parent family. She told him it would hurt her also. He told her if Myrtle Temple and she would go to the office and apologize to McDonald and tell him they were taking their names off (the petition) or forgetting about it, they would probably save their jobs. Cole's testimony was unrebutted as Johnson was not questioned concerning this conversation.

I credit Cole's unrebutted testimony and find that the invitation to Cole that she and Temple seek out McDonald and tell him they were abandoning the Union as a way to save their jobs was a threat of discharge if they continued to support the Union, however, well intentioned it may have been on Johnson's part. I find that Respondent violated Section 8(a)(1) of the Act.

The Reduction of Hours for Rebecca Cole and Myrtle Temple

In the fall of 1989 then-Foreman Scott Seabrook was brought in from another plant to review the costs of Respondent's second processing operation which had been increasing. He implemented several changes one of which was to decrease the amount of time for each of the scalers (including Cole and Temple) prior to the start of the processing lines and after the shutdown of the lines. Formerly, the scalers, who weigh the chickens, had been allotted more working time prior to the start of the line and after the shutdown of the line each day to set up and test the scales and to write

and date cards which were filled in with the weight as they were weighed during the processing of chickens on the line. As the scalers were one of the last steps on the line they also had time after the startup of the line each day before the first chicken came to them to fill out the cards. Additionally there were also slack periods and downtimes of the lines when no chickens were being processed. Cole worked on the whole bird line which was concededly not as busy as the other lines as there were not as many whole birds processed as cutup chickens processed on the other lines including the line on which Temple worked. Cole conceded there was downtime or slack periods and testified she helped Temple on occasions when there was no work on the whole bird line which was normally finished for the day substantially before the cutup lines. When Seabrook ordered a reduction in the off line time prior to and after the running of the line, this resulted in a loss of paid time for the scalers. Temple and Cole testified that they worked the reduced time as directed by Seabrook until shortly after Thanksgiving when he left to go to another plant when they, on their own initiative, went back to their old hours. Temple testified her supervisor, Johnson, was aware of this and raised no objections.

During this period, James Sanders had been hired by the Respondent as second processing supervisor and was oriented into the system by Seabrook who left to manage another of Respondent's plants. Sanders testified that when he initially came to Respondent's plant he was not familiar with its system and that as a result of this and his orientation into the system, he did not initially note Temple's and Cole's return to their original hours after their hours had been cut by Seabrook. Additionally employee Rosemary Williamson (a scaler) testified that she and other scalers had complained to their supervisor, James Daniels, that Cole and Temple were being allowed to work excessive over the line time while the other scalers were restricted to the time set by Seabrook. Accordingly, Sanders testified that in January 1990 he directed Cole and Temple to work the reduced hours. Apparently Cole and Temple balked at this contending that they could not set up and test their scales and do their cards in the allotted times. This apparently prompted a meeting between Varner, McDonald, and Sanders and Cole and Temple on March 22 in which according to Cole and Temple, Varner told them to either accept 5 minutes before the startup of the line or work solely during the line time and Respondent would have another employee set up and test the scales and prepare the cards. Sanders testified Varner offered to let Temple and Cole start at 6:50 a.m. and work 15 minutes after the startup of the line and to make cards ''during the day or take master card time, which is punch in and punch out with the line, and somebody else make all the labels.'' Temple and Cole testified they were allotted only 5 minutes before startup of the line at 7:25 a.m. to prepare the cards. Cole and Temple contended it would be impossible to prepare the cards in this time and chose not to prepare the cards and to work only line time. The Respondent then assigned Cynthia Bonner who had been working as a ''floater'' as needed on various jobs, to set up and test the scales from 6:45 to 7:20 a.m. for Cole and Temple, make their cards from 7:20 to 9 a.m. and date their cards for 30 minutes after the shutdown of the lines. The records show that Cole and Temple worked significantly less hours than the other scalers in the spring of 1990 although 1 week of hours were reduced as a result of Temple's vacation time. In June 1990, Temple was asked by Sanders to go to the vacuum pack line (a new concept in packing implemented by Respondent which was then being started up). She agreed and her hours have steadily increased until by the fall of 1990 she was working more hours than she had in the fall of 1989. Additionally, each of the lines were moved to a newly constructed section of Respondent's plant and Cole was moved to a different line with substantially more hours in the fall of 1990.

Analysis

The General Counsel contends that Cole and Temple were singled out for disparate treatment because of their support of the Union and their giving of testimony on behalf of the Union at the representation hearing in February 1990. With respect to the reduction of Cole's and Temple's hours in January by Sanders to revert to those to which they had been reduced by Seabrook in 1989, I find no violation of the Act as the evidence as a whole supports a finding that the original reduction of their hours by Seabrook applied to all scalers and was motivated by business reasons. Sander's direction to them in January to return to the reduced hours ordered by Seabrook after they had reverted to their original hours on their own initiative was no more than a return to the status quo prior to Cole and Temple ignoring Seabrook's orders and reverting to their original hours in contravention of Seabrook's reduction of the hours of scalers in the fall of 1989. I find, however, that their testimony of the miniscule time allotted to them before and after the line time in March by Varner should be credited. Thus, their choice to no longer set up and prepare cards was coerced or no choice at all in view of the significant reduction of time to do so. The Respondent contends that Cole and Temple were given ample time before to set up and test the scales and do the cards and had ample slack or lull time on the line during the day to do the cards and after the line time and that by being given a choice were accorded favorable treatment in view of their long tenure as employees. I credit Cole's and Temple's testimony as set out above and find that they were only allotted 5 minutes before the line time to set up and test the scales and prepare the cards. I note as contended by General Counsel in his brief that Bonner who was then assigned the task of setting up and testing the scales and preparing and dating the cards was allotted 3 hours and 25 minutes to do so. I conclude that the reduction of Cole's and Temple's allowable time to date cards to the minimal amount testified to by them was no real choice. Accordingly, I conclude that the General Counsel has established a prima facie case that Respondent reduced the hours of Cole and Temple in March 1990 in violation of Section 8(a)(3), (4), and (1) of the Act and that the Respondent has failed to rebut the prima facie case by the preponderance of the evidence and that Respondent thus violated Section 8(a)(3), (4), and (1) of the Act. *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984).

The General Reduction in Hours

Johnson and former Supervisor James Gurlach both testified that in February 1990 they were on the same bowling team as Assistant Sales Manager Allan Wilburn. Both Johnson and Gurlach testified that Wilburn arrived at the bowling alley and told them that they would be having some short days coming up as the Respondent was cutting back on the number of chickens being processed because of the Union. Johnson further testified that the following day he questioned Sales Manager Levon Williamson about the reason for the reduction of kill (number of chickens to be processed) and that Williamson replied, ''Why Billy Johnson you know the reason it is because of the Union is the reason.'' Levon Williamson, who was called by the General Counsel is no longer employed by Respondent but is now a broker in the poultry industry. He acknowledged that he might have made the statement attributed to him by Johnson or one similar thereto and testified that his superior, Sales Manager Jim Moore had told him the kill was being reduced because of the ''trouble'' in Hattiesburg which he (Levon Williamson) assumed meant ''union trouble.''

Johnson also testified to a conversation with Plant Manager Malcolm McDonald in mid-April 1990 when McDonald told him the Respondent was going to ''starve'' the employees out to defeat the Union as they had done in a prior union campaign at another of Respondent's plants. The Respondent's records show that there was a substantial reduction in kill which occurred in the spring of 1990. McDonald and Varner attributed this reduction to weather and other factors which reduced the number of chickens available to be processed by the Respondent, including a cold front that went through the areas in which the chickens were raised in December 1989 which did not impact the chickens available until the spring of 1990 because of the 3-month growth period of time required to produce a chicken ready to be processed. Wilburn denied having made the comments attributed to him.

Analysis

I credit the testimony of Johnson and Gurlach that Wilburn made the statement concerning the reason for the reduction in kill at the bowling alley. I also credit Johnson's testimony concerning Williamson's statement to him about the reason for the reduction in kill and concerning the statement made to him by McDonald relating Respondent's intent to ''starve'' the employees out to defeat the Union. I also found Williamson's testimony to be credible and note that although Williamson is no longer employed by Respondent he is now a broker in the poultry industry and he took great pains so as not be make any unintentional adverse inferences against Respondent. Although I note that a cold front did go through the Respondent's production area in December 1989, this did not appear to affect production at Respondent's facility in nearby Jasper, Alabama, which would also have experienced the cold front in its production area. I find that the General Counsel has thus established a prima facie case that the reduction in kill and consequent loss of hours by employees at Respondent's Hattiesburg plant was caused at least in part by Respondent's efforts to deprive its Hattiesburg employees of work and wages to retaliate for their support of the Union and demonstrate who controlled their livelihood. I find the prima facie case has not been rebutted by the Respondent. I thus find that Respondent violated Section 8(a)(3) and (1) of the Act by the reduction of working hours of its employees in the spring of 1990. *Wright Line*, supra; *Transportation Management Corp*., supra; and *Roure Bertrand*, supra.

The Withholding of a Wage Increase at the Hattiesburg Facility

The General Counsel called Scott Varner, Respondent's vice president of processing. Varner testified that in late 1989 and early 1990 he discussed with other members of management the conferral of a general wage increase to all of its plants including the Hattiesburg facility. However, according to Varner, on advice of legal counsel that Respondent would violate the Act because of the union activities of Hattiesburg if it included the Hattiesburg facility in the general wage increase, the Respondent withheld the wage increase from the Hattiesburg facility in February and March 1990 when the wage increase was given to the other facilities. Ultimately the wage increase was not given to employees at the Hattiesburg facility until after the Union withdrew its petition for an election by an order dated May 3, 1990, issued by the Regional Director. Former Supervisor William (Billy) Johnson testified that in March 1990 Varner stated he hoped the employees gave Myrtle Temple and Rebecca Cole hell about the loss of the wage increase. Varner testified that in response to the employees inquiries as to why Hattiesburg was not getting a raise and Respondent's other facilities were, that Respondent posted Respondent's Exhibit 19 on the bulletin board which appears to be comments from a legal publication that unilateral wage increases during organizing campaigns have been held illegal, citing case citations thereafter.

The General Counsel contends that the withholding of the wage increase until May or June 1990 shortly after the Union withdrew its petition for an election was a violation of Section 8(a)(3) of the Act relying in part on the comments attributed to Varner by Johnson and citing *Gates Rubber Co*., 182 NLRB 95 (1970); and *Red's Express*, 268 NLRB 1154, 1158 (1984), for the proposition that ''It is well settled that the employer's legal duty is to proceed as he would have done had the Union not been on the scene.'' The Respondent cites *Medical Center v. NLRB*, 756 F.2d 41 (6th Cir. 1975); and *Ohmite Mfg. Co*., 290 NLRB 1036 (1988), in which no violation was found when employers delayed wage increases to avoid the appearance of interference with an ongoing election campaign. The Respondent relies on the testimony of Varner that the wage increase was not scheduled, was not uniformly given each year and was dependent on profitability and the financial picture of Respondent and was not decided upon until February or March.

Analysis

I find that the Respondent's withholding of the wage increase until after the withdrawal of the election petition by the Union in May 1990 was not violative of Section 8(a)(3) and (1) of the Act. In the *Gates Rubber Co*., supra at 95, cited by the General Counsel, the Board stated, ''there was a policy that print shop employees, who were unrepresented, would be granted whatever wage raises were negotiated'' with the Union. In that case, the employer contended it could

not give the print shop employees the raise because of a pending representation election and that it was temporarily withholding the increase from the print shop employees pending the outcome of the election. The Board, in finding a violation of the Act stated (id. at 95), ''It is well settled that the employer's legal duty is to proceed as he would have done had the union not been on the scene. Here the Respondent withheld increases which would normally have been granted but for the presence of the Union and pending of the election and advised employees that their wage increases were being withheld for this reason.'' In *Red's Express*, supra at 1155, also cited by the General Counsel in upholding the results of an election, the Board stated:

> It is well established that the granting of a wage increase or other benefits during the critical period preceding an election is not per se grounds for setting aside an election. The crucial determinant is whether the wage increase or other benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect. As a general rule, an employer's legal duty in deciding whether to grant improvements while a representation proceeding is pending is to decide that question as it would if the union were not on the scene.

In *Red's Express*, the Board found that ''undisputed testimony supports the Employer's contention that it had decided, prior to the commencement of the union campaign, to restore the 10-percent wage cut as soon as a monthly operating ratio of 90 percent was attained.'' The Board concluded that the wage increase was not designed to interfere with the election.

In *Ohmite Mfg. Co*., cited by the Respondent, the administrative law judge found with Board approval no violation of the Act when the employer delayed a wage increase to avoid the appearance of impropriety or unduly influencing a pending election. In that case the specifics of the raise as in the instant case had not been finalized. See also *Medical Center v. NLRB*, supra, also cited by Respondent.

In the instant case the wage increase was not scheduled, was not finalized as to its particulars, i.e., such as the amount thereof and the dates to be granted prior to the advent of the pending union election. Varner testified and I credit this testimony that he was advised to delay granting of the wage increase pending the election so as to avoid any possibility of an unfair labor practice or any undue influence of an election. The legal comments posted on the bulletin board merely stated that in a number of cases employers have been found to violate the Act when they unilaterally imposed wage increases during the critical period in a pending election. I credit Johnson's testimony that Varner told him he hoped the employees were giving Temple and Cole ''hell'' about the delay of the wage increase. However, this statement to a supervisor did not render unlawful the decision to delay the wage increase until after the election. I also do not regard the comments by Varner at his meetings with employees concerning the union campaign as requiring a delay of a wage increse as determinative of this issue.

The Disciplinary Writeup of Patricia Walker

Patricia Walker was called on behalf of the Union to testify at the representation hearing held on February 22, 1990, and was thus identified as a union adherent. On April 6, 1990, Walker was written up on a record of discipline form while in her fifth month of pregnancy for leaving the line where she worked as a trimmer allegedly without permission with the notation ''Pat leaves the line without telling her supervisor.'' Walker testified initially at the hearing held in the case in January 1991 concerning the writeups and discharge of employee Charlene Jones. Subsequently when the hearing was reconvened in April 1991 Walker testified concerning the above writeup given to her on April 6, 1990, following an amendment to the complaint in this case which included this allegation following the filing of additional charges by the Union in January 1991.

Walker testified that on April 6, 1990, at 10 a.m., she called employee Tressie Thomas to the line and asked Thomas to ask Walker's foreman, Raymond Fleming, to allow Walker to have a break to go to the restroom as Fleming was not in the immediate area. Thomas, who fills in for other employees as needed, left and talked to Fleming, and then returned and took Walker's place on the line and Walker went to the restroom and returned in 5 minutes. At 2 p.m. that day she was called into a meeting with Dupre, Chandler, and Obery. Chandler told her she was written up for leaving the line without asking her foreman for permission. She told him she had sent Thomas to ask her foreman, Fleming, for permission and she asked what the difference was if she, herself, asked Fleming for permission or asked Thomas to ask him for permission. Chandler did not reply. Dupre said they did not want people taking breaks to be in the breakroom. She replied she had gone to the restroom. After the meeting she returned to the line and asked Thomas if she had asked Foreman Fleming for permission for Walker to leave the line and Thomas replied that she had and that he had said she could do so. As set out above at the time of this incident Walker was in her fifth month of pregnancy. She testified that in January 1990 she had asked Chandler for permission to go the the doctor during the workday because she was pregnant and he had given her permission to do so. Walker testified she had never received any other writeups and had not been previously counseled about leaving the line except in 1989 when she was counseled by Chandler but not written up. She testified that the normal procedure to obtain permission to leave the line was to request it of the foreman or if he is not available in the immediate area, an employee on the line could send another employee to find and ask the foreman and that this procedure had been in effect since late 1989. She had left the line without permission prior to this. She was not aware of any other employees who had received warnings for leaving the line.

Tressie Thomas who also works as a trimmer testified the normal procedure for an employee to obtain permission to leave the line is to ask the foreman and if he is not available in the immediate area, the employee asks another employee to find and ask him for permission. She had made requests on behalf of other employees to a foreman when she has been on the floor. She has made such requests for Ann Jones, Gussie McGilvery, and Patricia Walker. Thomas testified that when Walker asked her to request a break of her foreman, Fleming, she did so and he granted the request and Thomas took Walker's place on the line. The break was supposed to be for 5 minutes but she does not recall how long Walker was gone. She later heard in the breakroom that Walker had been written up. She acknowledged that in her

January 31, 1991 affidavit given to a Board agent she stated that she did not remember Walker ever asking her to ask her foreman for a break and she also stated she was not aware of the length of Walker's break and still does not remember the length of the break. She further acknowledged that in a later affidavit given by her on February 27, 1991, she stated Walker had taken a break for the normal break period of 5 minutes. She also testified that there is a bell employees can ring for a supervisor in order to take a break. The General Counsel also called Shirley Perkins who is a trimmer on line 1 who testified that 3 weeks ago (prior to the hearing in April) she needed to go to the restroom and sent an employee to find Foreman Chet Evans and the employee could not find him and she rang the bell and when Evans came, he told her not to ring the bell again. She acknowledged on cross-examination that she had rung the bell before but not unless there was an emergency.

The Respondent called Supervisor Chandler who is over the entire first processing production area consisting of the live deck, the picking department, and the eviscerating department. There are four eviscerating lines and there is a different foreman assigned to each line. Chandler identified the April 6 warning issued to Walker. He recalls a conversation with her foreman but not with Walker concerning this. Walker's foreman had told him several times that Walker was continually getting someone to take her place to get off the line and at times he would see another employee in Walker's place and did not know where Walker was. Walker is a good employee and this was Walker's only writeup for leaving the line. He has written up other employees for leaving the line and identified four warnings issued to other employees for walking off the line.

Former Personnel Manager Dupre testified that on April 6, 1990 Walker was brought into his office and told she had been leaving the line without the foreman's knowledge and without checking with him. She said she had told a fellow employee and ''we'' said that's not good enough because the foreman has to have someone to take your place and she said if that is what you want me to do, that is what I will do. He also testified that Walker is a good employee. Neither Foreman Raymond Fleming nor Assistant Personnel Manager Cathy Obery was called to testify.

Analysis

I find that the General Counsel has established a prima facie case of a violation of Section 8(a)(3), (4), and (1) of the Act by the issuance of the writeup to Patricia Walker on April 6, 1990. Initially, as set out elsewhere in this decision, Respondent's animus toward the Union and its supporters has been established. It is also established that Walker testified on behalf of the Union at the representation hearing held in February 1990 and was identified by McDonald as a ''ring leader'' of the Union's campaign. The Respondent concedes that Walker was a good employee but contends there were complaints by her foreman that she was habitually leaving the line without permission. I credit Walker's testimony and the corroborative testimony of Thomas that at Walker's request Thomas requested and received permission from Foreman Raymond Fleming for Walker to leave the line to go to the restroom. While I note the inconsistencies in the affidavits of Thomas, I do not find that this renders her testimony at the hearing as unworthy of belief as I found her testimony to be credible. I also find that Respondent's failure to call Foreman Raymond Fleming to testify leaves the testimony of Walker and Thomas unrebutted and supports an inference that Fleming's testimony would not have supported Respondent's position. I further credit the testimony of Walker that she had earlier apprised Chandler of her pregnancy in January and was in her fifth month of pregnancy in April 1990. I also credit the testimony of Walker, Thomas, and employee Shirley Perkins that it was routine to ask another employee to contact the foreman if he were unavailable to allow the employee on the line to make a personal request of him. I also find that the evidence supports a conclusion that the ringing of the bell was generally not to be utilized for this type of request but rather was utilized for emergency situations. Thus I find that the Respondent has not rebutted the prima facie case established by the General Counsel and find that the writeup of Walker was violative of Section 8(a)(3), (4), and (1) of the Act. *Wright Line*, 251 NLRB 1083 (1980); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984).

The April 12 Disciplinary Writeup of Temple

Myrtle Temple, a scaler, who had been employed by Respondent for 22-1/2 years at the time of the hearing testified that on April 12, 1990, she walked into the personnel office and Dupre, Varner, and Cathy Obery were there and Dupre handed her a writeup and said he had a complaint about her harassing an employee and ''bad talking employes'' and told her this was her first writeup and if she received a third writeup she would ''be out the gate.'' He asked whether she understood what he was saying. She said, ''Yes and I know where it is coming from.'' Dupre told her he would like to hear her side of the story. She told him she did not have a story to tell him because she did not have a witness. He asked her to sign the writeup and she refused and asked if that was all and he said yes. She then said, ''Thank you'' and left. She did not read the writeup. Temple testified she did not harass or ''bad talk'' an employee at any time including April 12, 1990. She had a conversation with Bonner on that date when she asked Bonner if she would relieve her for a break. Bonner then went to the box room where she did cards. About 20 minutes later Bonner came out of the box room and started up the line to give employees breaks. Temple asked Bonner if she was was going to give her a break. Bonner told her she had to go up the line first and give breaks and then she was going to take a break. Temple testified she said ''OK'' and had no other conversation with Bonner on that date or during the week of April 9 to 13. She testified further that no member of management or supervisor had any discussion with her prior to calling her into the office and telling her she was being written up on April 12.

However, she also testified that prior to her writeup of April 12 McDonald had talked to her in her work area in the presence of Johnson and told her she was talking too loud as he could hear her halfway to the cooler. She said, ''Malcolm [McDonald] I am not talking.'' He told her to lower her voice as ''These people are trying to work and cannot keep their mind on working with your loud talking.''

Johnson testified that in the second week of April 1990 he had a conversation with Renee Bonner in the breakroom. Bonner told him she and Temple had had a misunderstanding

about a restroom break, that Bonner had gone to personnel and Varner was there. Johnson asked her if everything was taken care of and she said ''yes.'' Later that day, he received a page to go to the personnel office and his arrival he found Varner and Cathy Obery engaged in a conversation. Obery then left the room. Varner then said he wanted Johnson to get Temple there and give her a writeup because Bonner had been there crying because Temple had been harassing her about the Union. He asked Varner if Bonner had said that. Varner said he knew it was union related and that he wanted Johnson to write Temple up. Johnson told him he had just spoken to Bonner and she had said everything was okay. Varner then said, ''I want you to write her up.'' Johnson told him he could not do that because he did not know if it was true. Varner then said, ''I will write her damn ass up myself.'' At that time Dupre came in and Varner told Johnson to tell Temple to come to personnel. Dupre then scribbled a note and handed it to Johnson to give to Temple, which he did and Temple then left. Temple returned in about 10 minutes and told him that Varner had written her up for harassing Bonner. Temple contended this was a lie and told him she had not signed the writeup. Johnson did not see the writeup. The April 12 writeup signed by both Dupre and Varner states that Temple was ''Harassing—Intimidating other employees.'' The memo also states under supervisor's comments ''Merle [Temple] has on several occasions caused morale problems by loud, overbearing talk while on the line.'' It also states, ''This warning was given after Renee Bonner came to personnel crying—saying that Merle threatens her every time she goes by there, saying things like when we get a union in here, we will get your job.''

Varner testified that on April 12, he instructed Johnson to write Temple up for harassing Bonner and Johnson said he would take care of it. Varner also testified that on April 12 he was present at the time Dupre gave Temple the writeup and that immediately before this Dupre told him, Dupre was bringing Temple to the office as Renee Bonner had complained that every time she went near Temple, Temple would yell at her and Dupre said he would talk to Temple. Dupre then went to get Temple and she came into the office and the writeup was given to her. Dupre told Temple there had been several complaints of her talking loud in the plant and harassing employees and that in this instance she was being written up. Dupre read the writeup and Temple refused to sign it and commented that she knew why he was doing this. Although the Respondent called both Dupre and Bonner in its case, it did not question either about this incident. Additionally Obery was not called as a witness. McDonald testified he had a conversation with Temple in April about her disrupting the work of other employees by engaging in loud talking as he had several complaints. He went in the plant and told her to stop and she said okay.

Analysis

I find that the General Counsel has established a prima facie case that the writeup of Temple by Respondent was motivated in part because of her support of the Union and in part because of her testimony on behalf of the Union in the representation hearing in February 1990. In reaching this decision, I have considered the animus toward union supporters and those who testified on behalf of the Union generally and the record as a whole. I have also considered the threat issued by McDonald to Johnson that the Respondent would rid itself of Temple and Cole and the other union supporters. I have also considered the long-term employment of Temple without previous discipline on her record. I find Johnson's testimony concerning this incident to be clear and credible as was Temple's testimony concerning this incident although I find there was friction between her and Bonner to cause Bonner to complain to personnel. I do not find, however, that the complaint from Bonner was the real reason for the writeup. Rather I find that Varner seized on this incident as a pretext for writing up Temple, a strong union supporter who had testified on behalf of the Union. As noted by the General Counsel, I also find Varner's earlier statement that he told Johnson to writeup Temple and that Johnson said he would take care of it not only to conflict with Johnson's credible testimony that he did not do so, but also to conflict with Varner's later testimony that Dupre had generated the writeup as a result of a visit from Bonner. I also find that Respondent's failure to question Dupre and Bonner concerning this incident and its failure to call Obery supports an adverse inference that their testimony would not have supported that of Varner. I thus find that the Respondent has failed to rebut the prima facie case established by the General Counsel and that Respondent's April 12 writeup of employee Temple was violative of Section 8(a)(3), (4), and (1) of the Act. *Wright Line*, supra; *Transportation Management Corp*., supra; and *Roure Bertrand*, supra.

The April 30 Disciplinary Writeups of Cole and Temple

Cole and Temple were both given a written warning by Second Processing Supervisor Sanders on April 30. However, neither was informed that they were being written up. Cole and Temple both testified they had been unaware of the disciplinary writeup until it was called to their attention during the course of the hearing. The disciplinary writeup for Cole states, in pertinent part:

> *Statement of Problem*: Improper dates on product labels.
>
> *Employee's Comments*: Rebecca [Cole] stated that since she did not make the labels that she could not be held responsible for the labels being incorrect. After explaining her job to her, she had no further comment.
>
> *Supervisor's Comments*: I informed Rebecca that even though she did not make the labels she still has a responsibility to the Company and to her job that the labels she is using are correct.

Although the writeup was signed by both Sanders and Dupre, Cole testified she had a conversation about the labels on this date with Sanders but not with Dupre. Sanders told her the labels had the wrong date and said she and Temple should have noticed them. She told Sanders that she and Temple had not dated the labels (a task that was then being performed by Bonner following Respondent's transfer of this work from Temple and Cole to Bonner on March 23) and they had merely written in the weight and number of chickens per box in their capacity as scalers and she had not paid attention to the dates.

Temple testified that on April 30 she met with Sanders and Dupre and Bonner in a conference room. Sanders told

her the USDA grader had found labels on grade A boxes with the wrong dates and that Temple was responsible for the accuracy of the labels and dates on the boxes. She told Sanders that Varner had taken this job away from her and that Bonner now made labels and dated the cards. He told her it was her responsibility to see they were right and to check all the cards that go on the boxes from now on.

With respect to three warnings issued on April 30, 1990 (one to Cole, one to Temple, and one to Bonner), James Sanders, the second processing supervisor testified there was a problem with incorrect dates on the labels. Several pallets of boxes had been run with the date for the preceding day as leftover cards from the previous day were used. He spoke with Cole, Temple, and Bonner in the conference room at the same time to try to come up with a solution. He had written this up as a disciplinary notice before he talked with the employees and after talking with them, he decided they were right and he did not think they deserved the writeup and they did not see it. However, he kept it in their files as documentation and did not tell any of these three employees that the documentation was in their files. He testified he utilized disciplinary forms for making notations until later advised by management that another form was available for this purpose.

Analysis

I find the General Counsel has established a prima facie case that Respondent violated Section 8(a)(3), (4), and (1) of the Act by the issuance of the disciplinary warnings to Cole and Temple on April 30. I also find that the Respondent has failed to rebut this case by a preponderance of the evidence. Initially as set out above Respondent's animus toward Cole and Temple as a result of their support of the Union and their giving testimony on behalf of the Union at the representation hearing has been amply demonstrated in this hearing. I credit Cole and Temple as to their versions of the conversations between Sanders and themselves concerning this incident which were essentially corroborated by Sanders. However, I do not credit Sander's explanation that he initially wrote up the writeups before meeting with Cole and Temple as the writeups themselves reflect his conversations with Cole and Temple and must have been written after his meeting with Cole and Temple. I also do not credit the contention of Sanders that the writeups were mere memorializations of the conversations as they were also signed by Dupre the personnel manager which indicates that he also received them and acquiesced in their placement in the employees' personnel files. I also find it unlikely that Sanders would have mentally changed the discipline of Bonner to a mere memorialization as Bonner made the errors in dating the labels for which Sanders, according to his testimony, was initially prepared to discipline Cole and Temple for not catching the errors. Accordingly, I do not credit Sanders' explanation. I find Respondent violated Section 8(a)(3), (4), and (1) of the Act by the issuance of written warnings to Cole and Temple on April 30. *Wright Line*, supra; *Transportation Management Corp*., supra; and *Roure Bertrand*, supra.

Incidents involving former employee Barney Chisholm

Chisholm was employed by Respondent from July 1985 until his discharge in July 1990. Chisholm was an active union supporter. Chisholm testified he talked with Union Representative Hubert Coker on the road outside the plant in December 1989 at a time when Coker was handing out union literature to employees. He himself later handbilled the plant on behalf of the Union. He also attended union meetings including one on February 15, 1990. He also talked to other employees about signing union cards for 6 or 7 months prior to his discharge by Respondent on July 17, 1990. Chisholm testified he is going blind. His discharge is not alleged as a violation. Chisholm worked in first processing and finished work several hours earlier than employees in second processing. As a result of his failing eyesight he is unable to drive a car and generally waited for several hours in the company breakroom or on the company parking lot for his ride home.

Chisholm testified that in early May 1990 he was in the personnel office talking to personnel secretary Cathy Obery after the conclusion of his workday and Personnel Manager Dupre told him, ''Barney we have warned you. After you get off work, you cannot sit in the break room or the parking lot.'' The next day his supervisor, Ora Mae Marshall, called him off the line to McDonald's office and McDonald, Dupre, and Chandler were present and McDonald told him when he finished work, he could not sit in the breakroom or go in the parking lot but had to wait by the side of the road or go to a grocery store about a mile away. McDonald told him he was going to put up a sign stating that when employees get off work, they must go to the side of the road or to the grocery store and could no longer stay on company premises. McDonald told him if he breathed a word of this conversation, he would be called back in the office and fired. The following day he went back into McDonald's office and inquired about the sign and McDonald denied having said anything about a sign. No sign was ever put up.

Chisholm testified that one day in the following week he came from the road to go to the breakroom to get a drink of water about 2:30 p.m. after the end of his workday and the guard asked his name. He replied, ''Barney'' and the guard told him that whenever he finished work he had to go beside the road and could not go back in the breakroom and sit down. He told the guard he was hot and wanted a drink. The guard told him Chisholm would suffer the consequences. Chisholm then went back in and observed four or five other employees who were finished with their workday sitting in the breakroom. The normal practice had been for employees to wait for their rides in the breakroom and to talk and drink coffee and smoke. Prior to these incidents he had waited for his rides on Respondent's premises for periods of between 30 minutes to 2-1/2 hours for the 5 years he was employed by Respondent. He either sat in a friend's or his sister-in-law's car or in the breakroom. He sometimes went in to the plant to get a drink or to use the restroom. He generally did not go into the production area of the plant except to get the car keys or to pick up a chicken his sister-in-law had ordered. On one occasion McDonald told him in May 1990 not to go into the production area and he did not do it anymore. He does not recall any warnings about talking to employees while they were on the clock. In December 1989 McDonald saw him sitting in a friend's car and told him he could not sit there anymore. Other employees routinely waited for their rides in the breakroom. In the first incident Mel Dupre told him he would call the sheriff and have him picked up if he came back inside the premises after he said he was coming

back in if it was hot or raining. On one occasion when he was standing by the road with Union Representative Coker, two employees from the night shift came up and asked if he was for the Union. He replied, ''Maybe, maybe not.'' They told him he would be sorry. The next day McDonald called him into the office and told him he had been called at home about the incident. McDonald asked if he had been threatened by these employees. McDonald told him he could be for or against the Union, that McDonald did not care.

McDonald testified that from June 1989 to May 1990 he had conversations with Chisholm concerning his presence in the plant after he had finished his work shift. He testified to two specific conversations. One occurred in the latter part of 1989 in his office. McDonald testified that Chisholm who worked in first processing would be through an hour or two prior to second processing and would sit in the breakroom with no comment from management until Chisholm began to go into the production area and walk up and down the cut-up lines and talk to employees. These employees used knives in their work and disruption of them could result in an accident. Consequently, McDonald told him in the first meeting not to go into this area and talk to the employees and Chisholm said that he understood and would not do so. The second meeting occurred 6 to 8 weeks later or could have been in April or May. In that meeting he and Dupre met with Chisholm in the personnel office. There had been a disturbance in front of the plant when two maintenance men were coming to work and a man handing out pamphlets tried to put one in their car and they stopped their car and were going after the man who said he needed a witness and Chisholm came running up and the men asked Chisholm if he was for the Union and Chisholm said yes and the men said we will take care of you also but on reflection they got back in their car and went into the office and told McDonald about it. He told the men ''we'' had to protect everyone on the company's premises whether they are for or against the Union and told them to ''back off'' and he would talk to Chisholm. Dupre and he discussed the incident and McDonald told Chisholm to leave the Company's premises after he had cleaned up at the end of his shift. Chisholm said he had to wait for his ride and he and Dupre told Chisholm it would be best if he left the premises. He denied ever telling Chisholm he was going to put up a sign telling employees not to remain on the premises after their shift.

On May 7, 1990, Respondent issued a disciplinary writeup to Chisholm signed by McDonald, Dupre, and Chandler for ''Staying on Company property after getting off work—second or third time this has been mentioned to Barney.'' The warning also contained the comments ''Barney stay[s] around bumming cigarettes, shooting the bull, etc. He knows he will be written up again if he continues to violate this rule.'' First Processing Supervisor Chandler testified that Chisholm used to borrow cigarettes from other employees and that when Chisholm joined them or tried to talk to them they moved away as they did not want to talk to him. The Respondent contends it was merely attempting to resolve an ongoing problem in which Chisholm was disrupting other employees by talking to them while in production and in the breakroom and by borrowing cigarettes from them and cites an earlier warning issued to Chisholm in June 1989 for interrupting employees on the production line. The General Counsel contends that Respondent engaged in unlawful threats, disparate treatment and issued the disciplinary writeup because of Chisholm's open support of the Union.

I credit Chisholm's testimony and find that it and the record as a whole including the testimony of Johnson who testified he was told to run off prounion employees Temple and Cole as well as Chisholm from the breakroom after work establishes that Chisholm was treated disparately because of his support of the Union. I thus conclude that the threat of arrest of Chisholm if he remained on Respondent's premises following the completion of his shift and the threat of reprisal by the guard, an agent of Respondent, were violative of Section 8(a)(1) of the Act. I find that the exclusion of Chisholm from the premises after the end of his shift, the May 7, 1990 disciplinary writeup, the refusal to permit him to discuss the alleged rule prohibiting employees remaining in the breakroom or parking lot after the end of the workday, and the preclusion of prounion employees from campaigning on its premises while antiunion employees were permitted to do so, each violated Section 8(a)(3) and (1) of the Act as I find the restrictions on Chisholm's activities and the issuance of a warning to him were motivated by Respondent's illegal purpose to stem the union campaign. I find the Respondent failed to rebut the prima facie case by the preponderance of the evidence. *Wright Line*, supra; *Transportation Management Corp*., supra; and *Roure Bertrand*, supra.

The May 17 Writeups of Temple and Cole

On May 17, 1990, Supervisor Sanders wrote up Temple and Cole on disciplinary forms for assertedly weighing boxes of chickens with ''missing giblets in whole birds.'' The writeups, which were also signed by Dupre and Supervisor Thomas Tholar, also stated under ''Supervisors Comments'' that a knowing failure to report any recurrence in the future will result in termination and were placed in Temple's and Cole's personnel files without their knowledge. It is noted in the writeup of Temple that she had reported the missing giblets and Sanders admitted at the hearing that she had done so.

Cole testified she was unaware of the disciplinary writeup issued to her by Sanders. On May 17 Sanders talked to her in his office with Supervisor Tholar. Sanders said they were having complaints because of giblets missing from boxes. She told him giblets are always missing from boxes because when chickens fall off the line, sometimes the giblets fall out and the packers do not put them back in. Sanders told her to be careful and if they saw a number of giblets missing, to make sure they put them back in. She agreed to do so, although it was not her responsibility as a scaler to check to see if giblets are missing. Temple also testified she had no knowledge that she had been written up by Sanders on May 17, 1990.

Sanders testified that the writeups were not disciplinary writeups but were rather memorializations placed in the personnel files of Temple and Cole as were similar ones placed in the personnel files of packers Diane Dawkins and Carrie Barnes. Sanders testified that after talking with the employees, he decided not to discipline them. Sanders testified that Temple had called him to her scale and said the birds had no giblets in them. He pulled a box out and confirmed this and then went to the stuffing lines and checked the birds which he found had giblets in them. He then went to the office and discussed the matter with McDonald. He prepared

a writeup (a record of discipline) for the packers and the two scale operators (Temple and Cole) because he understood from talking to Temple that she knew of this and had run the birds through without giblets and was only now telling him about it and he felt the packers should be disciplined for packing the chickens in the box without the giblets in them. Therefore, he prepared the writeups prior to talking to the employees (as is his custom) on record of discipline forms. He did not consider this a written warning but put it in their personnel files so that a year or two later he would have a record of it. He did not tell the employees he had written them up or ask them to sign it as there was no need to tell them. He used the disciplinary forms because these were the only forms he had at the time. There are now four new forms including a conference form which was what he had intended these writeups to be.

Analysis

I find the General Counsel has established a prima facie case that the May 17 warnings issued to Temple and Cole were disciplinary in nature and violative of Section 8(a)(3), (4), and (1) of the Act. As set out above Respondent's animus toward Cole and Temple because of their status as union supporters and because of their testimony on behalf of the Union at the representation hearing in February 1990 has been established. I do not credit Sanders explanation that these warnings were not intended to be disciplinary in nature but rather conclude that they were contrived and constituted further unlawful actions taken against Temple and Cole. I thus conclude that the Respondent has failed to rebut the prima facie case established by the General Counsel of violations of Section 8(a)(3), (4), and (1) of the Act. *Wright Line*, supra; *Transportation Management Corp*., supra; and *Roure Bertrand*, supra.

The Writeups and Discharge of Charlene Ann Jones

Charlene Ann Jones was employed by Respondent in 1976 until June 18, 1990, when she was discharged for having three disciplinary writeups which according to Respondent mandated her discharge. Jones had prior to her discharge been employed on the eviscerating line for 7 years as a heart and liver cutter. Jones appeared and testified on behalf of the Union at the representation hearing held on February 22, 1990. She also testified that she attempted to obtain the signatures of other employees on behalf of the Union and had several conversations at her apartment and at the homes of other employees on behalf of the Union. She also attended 11 union meetings held between November 1989 and late April 1990. She testified concerning a conversation with her foreman, Bill Helton, in November 1989 when he approached her on the eviscerating line where she worked and asked if she had heard the news. She asked, ''What news?'' and he replied about the Union. She told him she had never been in a union before and didn't know anything about a union. He said the Union had not done anything for him and did not want anything but your money. He told her if she had a question about the Union, to let him know. She asked whether the Union would be a third party if it were successful. He said Marshall Durbin (Respondent's owner) would never let a third party in.

As a heart and liver cutter on the eviscerating line, Jones' job was to remove the hearts and livers of the chickens and to remove the gallbladder and lungs without bursting the gallbladder which will soil the chickens and cause them to be downgraded and portions thereof to be damaged necessitating that they be trimmed. Jones testified she had not been warned before February 22 for excessive gall bursting but after that date when she testified at the representation hearing, management started ''constantly riding me for gall,'' although her frequency of bursting gall did not increase after that date. She testified that the heart and liver cutters on each side of her and the three ones across from her on another line burst gall as frequently as she did. She testified that on an average of 10 or 15 times a day, the birds already had gall on them from employees on the line in front of her. She acknowledged that she (as did all the cutters when they got behind) would cut in front of the person to her right (who was Gussie McGilvery in her case) and that McGilvery had never complained about this to her, nor had any of her other coworkers. The line moved from left to right. There were no injuries of any employees on the line as a result of her cutting in. Four times a day her supervisor Bill Helton would stand behind her for 5 to 10 minutes at a time and watch to see how many galls she was bursting. Although her performance did not change after February 22, Helton talked to her three or four times a day about the gall thereafter. He said there was a lot of gall on the line and he couldn't do her job and his also. On April 10, 1990, she met with First Processing Supervisor Chandler and was given a reprimand by Chandler who said her workmanship was poor and she was bursting a lot of gall on the birds and she told him at that time that the galls had already been burst down the line before the birds came to her. He told her he was going to have to tighten up on the gall.

On June 18, 1990, Bill Helton met with her in the employment office and said ''we'' had 135 burst galls on the chickens and he could not do her job and his also. She told him ''we'' (the cutters) did not burst all the gall on the birds, that they had come to them in that condition. She told him she was doing the best job she could and she had not burst all the gall alone. Later on the same day at 12:15 or 12:20 p.m. she was called to the personnel office and met with Personnel Manager Dupre and with First Processing Supervisor Chandler and Cathy Obery, the personnel secretary. Dupre told her he had reviewed her records and that she had three writeups and that it was company policy to terminate employees for three writeups within a 12-month period. Chandler said he had been watching her and told her she was a safety hazard and was cutting up the line. She told him they all cut up the line when they get behind. He also told her she was mixing hearts and livers and she said she only did so when the machine was working and ''they'' (the supervisors) told her to mix hearts and livers in the same cup.

On cross-examination Jones was questioned about Respondent's Exhibit 6, a record of discipline of May 31, 1988, signed by Helton and former Personnel Manager Ricky Rayburn, that stated that guts and lungs and gall are being sent to the chiller and that customers are complaining about the product. Helton noted on the document that he gave her oral comments on the line and there was no improvement and that there would be a reprimand, suspension, or termination if there was no improvement. She testified she does not re-

member him telling her this. She was also questioned concerning Respondent's Exhibit 7, which is a record of discipline of her of October 4, 1988, signed by her. She remembers this warning which states, ''Poor workmanship, job not being properly done, causing product waste. Employee has been repeatedly told about poor work, this date. No improvement.'' She recalls the warning but she told Helton there are 12 employees on the cleaning lines and that he could not tell her livers from anyone else's. She was also questioned concerning Respondent's Exhibit 8, which is a warning dated April 24, 1986, for throwing all hearts in the drain for at least 5 minutes. She acknowledges being told this but told them it was not true. She was also questioned concerning Respondent's Exhibit 9 a reprimand dated December 18, 1984, given her by Chandler for leaving the line without permission. She may have been reprimanded by Chandler for taking three breaks other than scheduled breaks but cannot recall. At the time of her discharge trimmers Cecilia Hayes and Gussie McGilvery were each taken into the office separately but she is not aware if they were written up.

Gussie McGilvery who has been employed as a heart and liver cutter and is a 14-year employee, testified as follows: She worked on the right of Jones on the heart and liver line for a 6-month period prior to Jones' termination. At times Jones cut in front of her to cut galls as did other employees who also worked on occasions on her immediate left as the line moves from left to right. She did not notice any problem with Jones cutting in front of her or bursting gall. Another employee, who now works on her immediate left cuts in front of her more than Jones did. When gall was burst, all three of the cutters were blamed. Other employees on the line include two drawhands and two inspectors and two trimmers. Anyone can burst gall before it gets to the heart and liver cutters and many times the gall has been burst before the chicken gets to the heart and liver cutters. Every day some chickens come down the line with burst galls. There is an eviscerating machine on the line which pulls the intestines out of the chicken before the draw hand and the draw hands finish what it does not complete. McGilvery recalls the day when Jones was discharged. Prior to Jones' termination Helton said on more then one occasion that he was keeping tabs and that the trimmers were keeping tabs on burst galls before they got to Jones. She does not know whether tallies are still being kept by Respondent on burst galls.

On cross-examination McGilvery testified she has worked 4 or 5 years as a heart and liver cutter. She works on line 1. There are four lines with three heart and liver cutters per line. Jones worked on all four lines one time or another and had worked next to her for about 6 months prior to her termination. She cuts every third bird. The bird is hanging by the legs and she cuts the liver from the gall and leaves a piece of liver on the gall so she does not touch the gall. She then cuts the liver off and then cuts the heart from the lung with a 6- to 8-inch long sharp scissors. When the gall bursts it can get on the heart and liver cutter and sometimes around the work station. If an employee cuts in front of her, she is cutting in front of McGilvery's hands. She acknowledged that Helton talks about burst gall almost daily. She has been written up for bursting galls. Usually all three heart and liver cutters are written up at the same time. She does not know how many writeups she received in the last year.

Cecilia Hayes, a heart and liver cutter, who has been employed by Respondent for over 4 years testified as follows: On June 18, 1990, she worked on the left of Jones and McGilvery worked on Jones' right. All three of them burst galls and received a writeup for bursting galls on June 18, although there was not an unusually high number of burst galls on that day. At least 2 days a week there are more burst galls than on the day Jones was terminated and employees have not been written up on these days. The sequence of the line originates with drawhands then trimmers and then heart and liver cutters. She has observed drawhands and trimmers burst galls. She leans over in front of coworkers 10 to 15 times a day while cutting hearts and livers and her supervisor, Ora Mae Marshall, has observed her do so and has never talked to her about it. All 12 of the heart and liver cutters on the four lines lean over and cut in front of each other and none has been criticized for doing so. Much of the gall that the heart and liver cutters get warned for bursting has not been burst by them.

Patricia Walker, a trimmer who has been employed since 1974, testified as follows: As a trimmer she works alongside a United States Department of Agriculture (USDA) inspector and trims off defective and contaminated parts which are thrown in the barrel. Trimmers work on the line right before the heart and liver cutters and keep a tally of burst galls. She has kept a tally since January 1990. If she has time, she cuts the gall off. If not, she just lets it go down the line. On June 18 all trimmers made a tally for the day. The tallies are turned in to the foreman and the trimmers have no access to them. The tally lists the total number of birds with gall prior to passing before the trimmers but not beyond the trimmers. She could observe Jones' work station from her work station on the next line. She observed Foreman Bill Helton watching Jones after ''we went to the Labor Board meeting'' twice a day for 5 to 10 minutes every day until Jones was discharged. She does not know of any employee other than Jones written up for cutting in front of other employees. Walker burst gall in her job and has never been warned for doing so. Gall was a problem all the time. She never received any warnings for her performance on her trimming job.

Bill Helton, a line foreman for 7 years who had supervised Jones as a heart and liver cutter for 4 years testified as follows: The job of a heart and liver trimmer (cutter) is to harvest the heart and liver from the viscera of the chicken by pulling it down from the chicken's viscera, cutting the heart and liver from the bile sac and lungs. It is then sent to the flume which is a pipe with water in it that goes to a pump that pumps it to a chiller which chills the product. Helton did not participate in the decision to discharge Jones. His supervisor, Chandler, issues the writeup which goes to personnel. He described the sequence of the line as follows: The first person on the line is a venter backup. The next two people are drawhands followed by two U.S.D.A. trimmer helpers and then the three heart and liver cutters. Next is a gizzard machine backup person. Next there are two craw pullers, a mirror station trimmer, and a house inspector. If the heart and liver trimmers burst the bile sac, they get gall on the birds which is poor job performance. Waste product should be dropped in the drain. Only clean products are to go to the chiller. If an employee does not do her job, he will orally warn her and also the people next to her. On June 18 he ob-

served Jones on several occasions with the bile burst on the birds. He wrote Jones up and probably wrote up the other two heart and liver trimmers. One hundred burst galls per day for all three heart and liver trimmers is an acceptable level. On the day of Jones discharge there were probably 200 birds that had to be cleaned up from the heart and liver trimmers which is an unacceptable level. He observed Jones four to five times that day before writing up a reprimand. When he observes a problem he observes the employee for 10 to 15 minutes. He has no specific recall of the day in question. He talked with all of the three heart and liver trimmers several times, not specifically just Jones. He specifically recalls having a lot of gall problems on June 18 and recalls at least 10 conversations he had with heart and liver trimmers on that date to address the problem. He observed the rack being filled up with birds to be cleaned and this caused him to talk to the employees. After his warning to the employees on June 18 did not seem to have solved the problem, he told his Supervisor Chandler of the problem later that morning. At 10 or 10:30 a.m. he spoke to Chandler again and told Chandler he believed a writeup was in order and Chandler agreed and he (Helton) wrote up all three heart and liver trimmers and gave the writeups to Chandler including the one issued to Jones. Chandler signed the writeups and said he would take them to personnel. The Respondent keeps records of burst galls. He does not keep records of burst galls. He does not know why Jones was terminated and the other two employees who received the writeups were not. There is a rule that three writeups are grounds for termination.

On April 30, 1990, Helton spoke to Chandler about Jones' work performance as she was a danger to the person next to her as she was working down the line with a pair of scissors and then cutting the hearts and livers and not bringing them back properly or dropping them in the drain properly. The big factor was the danger to the person next to her (Gussie McGilvery). He told Jones about this four or five times on April 30. He had first observed Jones performing her work improperly in the early morning about 7 o'clock. Chandler told him he had observed Jones doing the same thing and they needed to correct the problem. He had three conversations with Chandler that day about this problem and in the third conversation, he told Chandler it would be necessary to write Jones up for her job safety performance and Chandler did so. Jones is the only employee with whom he has had a problem with working up the line. No other employee under his supervision has been terminated for bursting too many galls, working up the line or having excessive waste product. He acknowledged that there are machines on Jones' line (the eviscerator) which can burst galls. There have been problems with the eviscerator in the past. The main one was with pulling the lungs out of the chicken or tearing breast meat. Although the eviscerator will burst gall, usually an adjustment of the tension of the belts on it will correct this.

Ken Chandler, an 18-year employee and the supervisor over first processing which includes 110 employees and 8 supervisors, testified as follows: The eviscerating department takes everything out of the chickens. There are four eviscerating lines and there is a separate foreman for each line. Heart and liver trimmers reach up and pull the viscera (the heart and liver) down, make three cuts, and separate the heart and liver with a pair of very sharp curved scissors. During his 18 years, there have been many accidents with these scissors ranging from slight to very serious cuts. The rack has 14 spaces for birds which are usually hung for lungs and gall on the outside skin. Gall bursting means the green bile from the gallbladder has burst and soiled the product which then must be trimmed and becomes a downgraded bird (i.e., from ''A'' to ''parts missing''). Gall bursting is a daily occurrence. Roughly 30,000 birds are run through each eviscerating line each day. One hundred burst galls is an average day. Anything over 100 to 150 is a bad day. He can tell if it is a bad day by looking down the line at the house inspectors' racks as they will be full and if you see green bile on the outside of the birds, there is gall on them. If the rack gets loaded, the mirror trimmer rings a bell or it may be noticed visually. During the spring and summer of 1990 line 1 on which McGilvery, Jones, and Thomas worked had problems with burst galls. Respondent keeps track of burst galls by having the venters or drawhands mark down any burst gall that comes to the trimmers and on the other end of the line at the house inspector, a separate sheet and anything coming to her is marked down. You take the difference and see where the burst galls are coming from. During this period the heart and liver trimmers were bursting the most galls. These tally sheets are thrown away at the end of the day. When he was there observing the heart and liver cutters, the gall bursting would decrease. The policy with issuing written warnings is to talk to the employees until it reaches a point where there is no change and employees do not respond, at which point a written warning is issued as a last resort. During this period of time Jones also had a problem with cutting in front of another employee (Gussie McGilvery) and Helton informed him the problem was continuing. The April 30 warning issued to Jones was for poor workmanship and safety hazard for mixing hearts and livers and working up the line in front of another employee. Jones was the only employee consistently cutting in front of other employees and was mixing hearts and livers as a result of not working in front of her station. She was reaching as one of the flumes was back and the other a little ahead of her. She continued to have this problem after April 30. Warnings were issued to Gussie McGilvery, Charlene Jones, and Cecilia Hayes on June 18 for burst gall on line 1. After he wrote these warnings he took them to personnel. He told Personnel Manager Dupre there was still a problem with Jones cutting in front of McGilvery and told him it may be Jones' third warning. He then went back to work. Later that day Dupre told him it was Jones' third written warning within a 12-month period which mandates discharge under Respondent's written policy. He had a subsequent conversation with Jones when he went back to give her check to her. There have been several personnel managers in the last few years and at times there was no one manning the office. He was unaware that McGilvery had three written warnings in her file within a 12-month period until the initial hearing in this case in January 1991. McGilvery is a good employee. They were not having the problems with her that they were with Jones. All of McGilvery's warnings were group warnings. It just didn't stick in his mind. He was also unaware until this hearing that Florestine Thomas and Sherry Collins had three written warnings within a 12-month period and neither one was terminated for this. He has terminated other employees for three written warnings within a 1-year period.

Chandler testified further: He issued the disciplinary writeup for Jones on April 30. On June 18 he told Dupre around 9 a.m. that he had an employee who was not responding and the only course would be a written reprimand and Dupre agreed and then brought Jones into his office and wrote her up and as it was her third written warning, he terminated her. He told her the problem was the safety hazard of cutting in front of other employees and this was causing her to drop hearts and livers in the wrong cup. Jones said she was not the only one doing it. He does not remember if Jones said anything when he told her, she was terminated. He had first observed Jones' safety hazards over a 2- or 3-week period prior to the April 30 date. He observed Jones continually cutting in front of another employee trying to perform her work and always trying to talk to the other employee and this caused the other employee (Gussie McGilvery) to have to move to the side. He saw her do it three or four times a week. She would normally do it until someone told her about it and then would get back in her own position. He told Helton to go down to talk to Jones and Helton agreed it was a problem which he also had noticed and Helton went down to talk to Jones immediately. The situation did not improve and he talked to her after Helton did. He and Helton talked to Jones several times concerning the problem over a 2- or 3-week period prior to April 30. He walked up to Jones and told her she should quit cutting in front of another employee as it was a safety hazard. Chandler wrote the warning issued to Jones on April 10, 1990, based on his personal observations of Jones, conversations with foremen, charts from trimmers and house inspectors and visual inspections of the work station. He cannot remember specific conversations with foremen prior to the issuance of this writeup.

Former Personnel Manager Mel Dupre testified as follows: He was involved in the termination of Charlene Jones. Chandler came into his office on June 18 and said they needed to give that line (line 1) of heart and liver cutters a written reprimand. Chandler said he had talked to these employees about quality control and it was not getting better so he wanted to give them all a written reprimand and in addition Jones was a safety problem cutting in front of the next trimmer and she had been previously warned. Chandler said they needed to look at her file as she was not responding to warnings and when Dupre pulled her file he realized she had the number of warnings which mandate termination. They told her they were terminating her but if she wanted to think about it, she could reapply and they would consider it after several months. He was not aware that Gussie McGilvery had three written warnings within a 12-month period until he learned of it when preparing for this hearing.

Analysis

The General Counsel contends that Chandler's account of the April 10 writeup of Jones is unreliable and was countered by Jones' credible testimony that after she testified on behalf of the Union Respondent started ''constantly riding'' her ''for gall,'' although her work performance had not changed as corroborated by Gussie McGilvery who worked alongside Jones and as supported by the testimony of Johnson that McDonald told him in late April that Respondent was going to get rid of all the union supporters. Johnson also testified that McDonald referred to all the employees who testified at the February representation hearing (including Jones) as ringleaders of the union campaign. Respondent's failure to question Helton regarding the April 10 allegation gave rise to an inference that his testimony would have been adverse to Respondent's interest. The General Counsel also argues that Chandler initially gave sweeping testimony about what had happened with respect to this writeup but on cross-examination was unable to recall any specific dates or events. The General Counsel concludes that the April 10 writeup was issued solely because of Respondent's discriminatory motivation to retaliate against Jones for her support of the Union including her giving testimony on its behalf at the representation hearing.

With respect to the April 30 writeup of Jones, the General Counsel contends that although this incident was not alleged as a violation it was closely related to the other allegations and fully litigated at the hearing and is ripe for determination on the merits. The General Counsel contends that this writeup for ''poor workmanship and safety hazard. Mixing hearts with livers and working up the line in front of another employee instead of at her position'' was also violative as ''Jones credibly testified she mixed hearts and livers together only when told to do so and that when directed to separate them she did so, and that she did not cut in front of other employees but would occasionally if she fell behind reach up the line.'' The General Counsel notes that McGilvery corroborated Jones' testimony concerning the occasional reaching by Jones and testified that Jones did not do this more frequently than other employees and also notes the testimony of employee Cecilia Hayes who testified she leaned over to cut in front of another employee 10 to 15 times daily in the presence of her supervisor, Ora Mae Marshall, without reprimand or criticism and that she has seen other heart and liver cutters do so without hearing of any criticism of them. The General Counsel also relies on the testimony of Patricia Walker that she had never heard of any employee other than Jones being written up for cutting in front of an employee on the line. The General Counsel also notes that the Respondent offered no prior writeup of any employee for cutting up the line. The General Counsel contends that Helton and Chandler offered only vague accounts of conversations with Jones and each other on this matter and that Chandler was able to recall very little concerning this warning and on one occasion Chandler testified erroneously that the ''problem with Charlene cutting in front of another employee'' was ''her third written warning'' and was the reason for discharge.

With respect to the discharge of Jones on June 18, the General Counsel contends that the discharge of Jones on June 18 dovetails with the second discriminatory transfer of Powell (discussed infra) also occurring on June 18 ''entailing her [Powell] being moved from the arduous task of making boxes to the still more arduous, frenetically paced task of cutting hearts and livers'' as Jones and Powell were two of the five employees who had testified as witnesses for the Union in the representation hearing in February. The General Counsel notes that on June 18 Respondent issued a third writeup of Jones asserting she was discharged in accordance with its rules mandating discharge of an employee for receiving three writeups in a 1-year period but that Respondent offered no written rule on this subject although Helton, Chandler, and McDonald testified that there is a written rule and a company policy manual written in 1986. The General

Counsel also points to the Respondent's failure to discharge four other employees who had accumulated three writeups in a consecutive 12-month period all of whom received these writeups after 1985 when Respondent's witnesses contended that it promulgated a rule requiring dismissal of an employee who receives three writeups within a 12-month period. The General Counsel further contends that Foreman Helton, who issued the June 18 writeups for excessive gall to Jones and the other two heart and liver cutters working on her line, was unable to ''even estimate the number of times that he observed Jones and her co-workers or approximate the time of day of any of such occasions.'' The General Counsel notes that Helton was also unable to provide any specifics of his purported conversations with these employees during the day or to estimate the number of burst galls on that date.

Thus, the General Counsel contends that each of the warnings issued to Jones was violative of the Act and that the close scrutiny given to Jones by Helton as testified to by Jones and corroborated by Walker, after Jones testified at the representation hearing was also violative of the Act and although this scrutiny was not specifically pleaded, it was fully litigated at the hearing. The General Counsel also contends that the discharge of Jones was violative of Section 8(a)(3) and (4) of the Act and that a finding of a violation of the April 30 warning should also be found as it was fully litigated at the hearing although not specifically pleaded.

The Respondent contends that two of the three warnings issued to Jones were group warnings given to other employees as well as Jones and that the General Counsel has conceded that the April 30 warning was not violative of the Act as it was not specifically pleaded as a violation. The Respondent notes that Jones and other employees received warnings for poor production including, excessive gall in the past as evidenced by several copies of warnings issued to employees in the past including one issued to Jones in 1984 and one issued to Jones in 1988 and thus contends that the issuance of the warnings in this case was not unique. It contends further that the General Counsel's repeated questioning of Chandler and Helton into the details of each of various conversations with the employees and each other concerning the warnings issued to Jones did not dispel the basic proposition that Jones received warnings as did other employees for poor performance and that she was the only employee who consistently cut in front of other employees constituting a serious safety hazard. It contends that Jones was thus discharged pursuant to a valid rule that any employee receiving three warnings within a consecutive 12-month period will be discharged. It contends that the cases of Gussie McGilvery and three other employees who also received three warnings in a 12-month period and were not discharged, do not establish proof of disparate treatment of Jones but rather were the result of poor recordkeeping by its personnel department as a result of poor performance of a former personnel manager prior to Dupre, turnover in that position, and a substantial period of time when there was no personnel manager.

After a review of the foregoing, I find the General Counsel has established a prima facie case of violations of Section 8(a)(3), (4), and (1) of the Act by the undue scrutiny of Jones' work following her giving testimony at the representation hearing on February 22, 1990, and the subsequent warnings issued to her and by its discharge of her. Initially, I find that Respondent's animus toward the Union and its supporters and its' identification of Jones as a union supporter who testified on behalf of the Union at the representation hearing has been established and Respondent's knowledge of Jones' role as a union supporter may be inferred to Helton, Chandler, and Dupre who were involved in the actions taken against Jones; I also have considered Jones' long tenure with Respondent as a 14-year employee who had spent the last 7 years in her job as a heart and liver cutter and who had received only four written warnings in the past, and I find it unlikely that her performance suddenly changed dramatically for the worse as indicated by the three writeups issued to her in 1990. I credit Jones' testimony and that of Walker that after Jones testified in February she became the subject of close scrutiny by Helton who watched her for substantial periods of time and stood behind her on the line, as he had not done in the past. I also credit the testimony of Jones as corroborated by McGilvery and Hayes that Jones did not cut in front of other employees on the line any more than did other employees. I also find it significant that Jones was discharged for three writeups in a 12-month period while other employees so situated were not and find this establishes disparate treatment of Jones. I also find it significant that Respondent failed to produce a written rule requiring the discharge of employees who are issued three writeups within a 12-month period and conclude that no such hard and fast rule existed. I also find it unlikely that Respondent would have been set on discharging Jones, a long-term employee for the alleged infractions without an ulterior motive. I also find significant the shifting reasons for discharge offered by Helton and Chandler and the disparity in their respective versions of the reasons for Jones' discharge. I thus find that the scrutiny of Jones, the warnings issued to her and her discharge were all motivated by Respondent's desire to retaliate against her because of her support of the Union and giving testimony on its behalf and find that these actions taken against Jones were part of Respondent's overall scheme to rid itself of supporters of the Union. I find the April 30 writeup of Jones and the close scrutiny of her following her testimony at the February 22 representation hearing are closely related and have been fully litigated. *Denholme & Mohr*, 292 NLRB 61 (1988). I thus find the Respondent has failed to rebut the prima facie case established by the General Counsel and that the Respondent violated Section 8(a)(3), (4), and (1) of the Act by the close scrutiny directed against Jones, and by the issuance of the April 10 and 30, and June 18 warnings to Jones and Gussie McGilvey and Cecilia Hayes which were inextricably interwined with the writeups of Jones and by the discharge of Jones. *Wright Line*, supra; *Transportation Management Corp*., supra; and *Roure Bertrand Dupont, Inc*., supra.

The Discharge of William (Billy) Johnson

William (Billy) Johnson was a foreman in charge of the grading and packing department and a 10-year employee of Respondent until his discharge in May 1990, Johnson has testified concerning a number of allegations in this hearing. Johnson presented himself as a supervisor willing to do Respondent's bidding in its unlawful campaign conducted against the selection of the Union as the bargaining representative of its employees but only up to the point where no actions would be taken against employees under his supervision. Thus, Johnson as directed by Respondent's man-

agement by his own admission, willingly interrogated employees under his supervision concerning their union sentiments and wrote down their comments plus his assessment as to whether they were prounion or procompany or their opinions were unknown as to their sentiments concerning the upcoming representation election. However, Johnson testified he refused to carry out certain of Respondent's management's instructions concerning retaliation to be taken against known union supporters under his supervision. He testified he was told by Plant Manager Malcolm McDonald to follow up on the work of employees Temple and Cole, to get something on them so that they could be fired, and that he and another employee checked boxes of chickens weighed by Temple and Cole and found no errors and he reported this to McDonald. He testified he refused to plant company property on employees Temple and Cole as requested by Personnel Manager Mel Dupre and that he warned Temple and Cole they should ''watch their ass'' as Respondent wanted to fire them. He testified he was instructed to obtain the names of the employees wearing union buttons on May 2 by McDonald who told him six employees were wearing them and found six employees wearing them but gave them each an opportunity to remove their button before writing their names on a list and thus gave McDonald a list with only four names as some of the employees agreed to remove their union buttons. Johnson also testified that when he was told Temple had harassed employee Bonner, he talked to Bonner who told him things were okay between her and Temple, and he refused to give Temple a warning as directed by Vice President Scott Varner who then issued the warning to Temple, himself. Johnson testified he believes he was discharged because of his refusal to carry out unlawful orders to discriminate against employees because of their support of the Union and also because he (a white man) dated black females. He based these assertions on past warnings from members of management and from a statement from his supervisor, James Sanders, that Vice President Varner wanted to discharge him because he dated black females. He also testified that Sanders had chastised him for being too friendly with Merle Temple, a union supporter, after a meeting at which Assistant Director of Human Resources Neil Keith had told the supervisors to give the cold shoulder to prounion employees and that at the time of this warning by Sanders, Sanders told him that Varner ''wanted to fire his ass anyway.'' He also testified that a former plant manager had spoken adversely about his dating black females and that other employees had advised him of Respondent's hostility toward him as a result of his dating black females.

As noted in the Respondent's brief, Johnson testified on four occasions in the hearing concerning these and other allegations. Initially, he testified concerning his discharge which occurred on May 3, 1990. He testified that at 8:30 a.m. in Plant Manager Malcolm McDonald's office, McDonald said that Vice President Varner had said that a number of employees on Johnson's line were wearing union buttons and that McDonald thought there were about six employees wearing them and that McDonald wanted Johnson to get out on his line and write down the names of the people and bring the list back to him because he wanted to know who the ''son of bitches'' were, Johnson testified he went out on the line and explained to the employees what McDonald wanted and some of the employees took their buttons off. He wrote down only the names of the employees who refused to take their buttons off. He turned the list into McDonald and laid it on his desk without comment as McDonald was on the telephone at the time.

Johnson testified that later that day about 4 p.m. he was called to McDonald's office and went inside with his immediate supervisor, James Sanders, and Sanders closed the door and McDonald closed the blinds in the office and said, ''Bill I have got some sad news for you.'' Johnson said, ''Yes, What is it Malcolm?'' McDonald said, ''Scott [Varner] said to let you go.'' Johnson asked why and McDonald said he didn't know and talked for 3 or 4 minutes and told Johnson he was the best supervisor he had ever had, the best in working with people and was leaving a lot of friends at Durbin and he was one of them. McDonald told him to go Monday and sign up for unemployment and he would have his severance pay for him next week. Sanders and Johnson then went back to Sanders' office and he asked Sanders what was going on. Sanders said he didn't know but it had something to do with Personnel Manager Mel Dupre and Scott Varner, that he and McDonald couldn't do anything about it, and neither liked nor approved of it. Johnson testified as follows on cross-examination: He was never told by management the reason for his discharge and had no prior notice of it. The following morning he became aware of Respondent's asserted basis for his discharge when informed by fellow supervisor and friend Robert Boutwell that Varner was telling the foremen that Johnson had his hand in employee Annette Fairley's pants. Boutwell told Johnson he didn't believe it. Johnson told Boutwell, ''It is a damn lie.'' Johnson testified Annette Fairley also called him the same day. Johnson testified he did not have his hand down Fairley's pants and denied ever having his hand down Fairley's pants or grabbing her breasts or engaging in physical horseplay with her or any other employee.

Johnson testified that on May 3 he was in the box room, which was under his supervision, and saw Personnel Manager Mel Dupre who was in the box room before he entered and before he went to Fairley in the box room. Johnson testified he put his hand on Fairley's waist for about 2 or 3 minutes. He asked her how her diet was going. She said fine and asked him how his diet was going and he said ''pretty good.'' Johnson testified the employees had called him to the box room to ask whether it was true that the Union had withdrawn its petition for an election and he replied in the affirmative. Johnson said he had his back to Dupre who was walking toward them and ''Connie'' (Richardson) said here comes Dupre and ''I said, f—k Dupre . . . . That was my opinion of worrying whether or not Dupre was coming up behind us or not. I had nothing to hide.'' In his affidavit furnished to the Region, Johnson had said of his encounter with Fairley, ''We had both been on a diet, and I pinched her outside her shirt above her pants and below her bra—in other words at the waist line and asked her how her diet was going.'' He testified in response to questions about his affidavit that he both pinched her and had his arm around her waist. In response to questions on cross-examination concerning whether he had touched any other employee, he testified that in 1986 former employee Patricia Robinson asked him on several occasions to feel her breasts and that on one occasion she put his hand on her breasts and he felt her breasts, but that this was the only occasion on which he ever

touched an employee on her breast. Johnson identified an Equal Employment Opportunity Commission (EEOC) charge he filed on August 17, 1990, following his discharge on May 3, 1991, and which charge asserts that he was discriminated against because of race because he, a white man, dated black females. He sent correspondence to the plant asking for a statement of the employees who worked in the box room (Annette Fairley, Connie Richardson, Perry Tisdale, and Ollie Wilson) but he did not specify what they were to say. On redirect he testified it was a frequent occurrence for other foremen in the plant to grab and do sensual and seductive things to female employees during the time he was employed by Respondent.

Scott Varner, the vice president of Respondent's processing division testified he participated in the decision to discharge Johnson in conjunction with Personnel Manager Mel Dupre. He testified that on May 2 or 3 Dupre informed him that he had walked into the box room and saw Johnson with his hands down the pants of employee Annette Fairley. Varner testified he asked Dupre if he saw exactly what he was telling him and Dupre said he had and Varner told Dupre to fire Johnson. Dupre said he would take care of it. Varner had no conversation with Johnson.

Varner subsequently testified in Respondent's case-in-chief that he had never told Sanders that he wanted to run Johnson off. He testified he discussed the wearing of buttons by employees with McDonald as there was a group of employees wearing buttons and stickers and labels and the United States Department of Agriculture (U.S.D.A.) does not allow it and they wanted it stopped. He told McDonald he wanted a list of employees who were wearing anything. He never saw the list because the employees removed the items when requested and there was no problem thereafter. He does not know if a list was prepared. He told McDonald to terminate Johnson because of the incident reported to him by Dupre. Around the same day he had a conversation with Annette Fairley and told her ''we didn't hold her accountable for the problems, that a management person had created the problems for himself and it didn't have anything to do with her.''

Johnson was recalled to the stand by the General Counsel to testify concerning additional charges filed during a recess of the hearing and in cross-examination was questioned concerning testimony he had allegedly given to the effect that he had never touched an employee while employed by Respondent and he denied that he had said that he had never touched an employee. He testified he does not recall ever touching an employee on their private parts. He testified no employee had touched him on his private parts with the exception of Diane Dawkins who 2 or 3 years ago stuck her hand in his lab coat and grabbed his privates and then walked around describing the size. He also testified that 4 or 5 years ago employee Connie Richardson grabbed his jogging pants and pulled them toward her, pretending to see his privates and yelled. He also testified that employee Shirley Dansler used to engage in horseplay by grabbing his arm and saying ''she was going to whip your ass.'' On cross-examination Johnson testified he believes he was terminated because of his longstanding dating of black females and also because of his refusal to commit unlawful acts against prounion employees. This references his reporting that he had not found any problems with prounion supporters Temple's and Cole's work after checking it in response to McDonald's telling him to check their work and find a reason to fire them, his refusal to agree to plant company property on Temple and Cole in order that it might be found in their possession and used as a pretext to discharge them as requested of him by Personnel Manager Dupre, his friendliness to Temple and Cole and his refusal to give them the cold shoulder as directed by Assistant Director of Human Resources Neil Keith in his meeting with the foremen when Keith told the foremen to give the prounion employees the cold shoulder, his failure to list all the employees who wore prounion buttons on the morning of the same day of his discharge as requested of him by McDonald on orders from Varner and his refusal to issue a warning to employee Temple as directed by Varner. He testified further on cross-examination in response to questions by Respondent's counsel that he had never attempted to make physical contact with Brenda Fudge, a former employee and did not ask her out. He testified he has seen her several times since she left her employment with Respondent as she has an account at the rental store he manages and that she told him she had refused to testify. He also testified in response to a question by Respondent's counsel that he has never heard of Diana Smith.

Johnson testified further that members of management have known about him cohabiting with a black female for 5 years, that in October 1986 the former plant manager told him he had heard that Johnson was living with a black female. The plant manager (C. B. McMillen who has since died) said ''I am speaking for myself and the Company, we are not going to put up with it'' and told Johnson to either get rid of her or lose his job. Johnson testified that the black female involved with him has never worked in his department but did work for Respondent for 8 or 9 months in 1989. He testified further that in October 1989 he told McDonald that he was thinking of taking a job with the U.S.D.A. as they have been good friends and that McDonald told him to think pretty hard on it (seriously consider it) as a ''bunch of people in Birmingham [Respondent's home office] put a bunch of shit on you. Scott Varner didn't like your living with a black female and especially now that they had gotten wind of the union organizational meeting going on.'' He testified McDonald then said ''I can't tell you what to do. You and I have always worked together and gotten the job done but the people in Birmingham don't like it. You probably need to consider taking the job with U.S.D.A.'' Johnson also testified that in March or April 1990 his immediate supervisor, James Sanders, told him that he and Johnson should talk after work. After work that day he went to Sanders' office who questioned him about living with a black female and Sanders told him it made no difference to him ''but the people in Birmingham don't like it.'' Johnson said, ''Well Jim, I said, yes I am'' and Sanders said, ''Well Scott Varner is planning on running your ass off for it'' and Johnson said, ''well tell him to go ahead.''

The General Counsel also called Annette Fairley to the stand. Fairley testified that on May 4 Scott Varner spoke to her outside the plant and asked if she knew why Johnson was discharged. She replied she did not and asked him the reason, Varner told her ''I just want you to know it didn't have anything to do with you.'' She testified that Johnson did not have his hands in her pants and that on May 3 Johnson came into the box room as he always did and talked to the employees and they were talking, ''and he stood beside

me and put his hand around my waist. And he said, my old Annette—she sure losing that weight.'' She testified that prior to Johnson's discharge no supervisor or member of management asked her what occurred between her and Johnson and she did not discuss it with them.

On cross-examination she testified that Johnson touched her but not improperly. She acknowledged that Johnson had talked sexually to her and she has heard him make sexual comments about other employees such as ''I bet she got a good body'' but nothing else. The comments were made weekly. She testified further on cross-examination that on May 2 Johnson had his arm around her waist for 3 or 4 minutes. He came up and grabbed her around the waist and said ''my old buddy Annette—she is sure losing that weight,'' and ''I just said, yes, I am.'' She acknowledged that she has wrestled with Johnson in the past but denied that he ever slammed her on top of the boxes in response to questioning about this by Respondent's counsel. She testified that Johnson might hit her on the shoulder and she would hit him back.

In its case-in-chief Respondent presented the testimony of several witnesses concerning the discharge of Johnson. They were box room employees Perry Tisdale and Ollie Wilson, employee Cynthia Bonner, former employee Brenda Fudge, former Personnel Manager Dupre, McDonald, Sanders, and Varner. Tisdale testified that he worked around Johnson and on several occasions had observed Johnson touch the breasts and buttocks of Annette Fairley and that Fairley engaged in sexual horseplay with Johnson and that on one occasion she grabbed Tisdale's penis. He observed Johnson put his hand on Fairley's buttocks just about every day. Tisdale talked to an EEOC investigator about this. On cross-examination Tisdale testified he has heard former Supervisor and Foreman Otha Hinton make sexual remarks to women (including Ann Thompson) 20 or 30 times. He observed Hinton physically touch Thompson on the buttocks on more than one occasion. He has also seen written matter depicting sexual acts. He has heard Foreman Luke Moody make remarks of a sexual nature to female employees at least 20 times and has observed Moody make sexual proposals to females.

Box room employee Ollie Wilson (a female) initially testified she never observed Johnson touch another employee. She also testified to an occasion when she observed former employee Diane Dawkins with her hand inside Johnson's lab coat describing and laughing about the size of his penis and Dawkins and Johnson and Wilson all laughed. She testified she never saw Johnson touch an employee's breasts or buttocks. She observed Johnson and Fairley engage in horseplay, wrestling and one time Johnson picked up Fairley and threw her down on a pallet of unmade boxes. On another occasion Fairley scratched him on the arm during horseplay. She also testified that on one occasion she saw Fairley ''screwing T-Bone's (Perry Tisdale's) bootie'' (described as grabbing a person from behind by the hips and making a motion depicting sexual intercourse up against them). She identified a typed statement given to her by Johnson stating that she was 10 feet away from Johnson and Fairley on May 3 during the alleged incident and did not see Johnson engage in any improper conduct. He had also previously given her another statement saying she was only 3 feet away from them at the time. She testified she was actually 50 feet away. On cross-examination, she testified she never observed Johnson grab or touch any female in an improper or sexual manner or on their private parts. She has never told any member of management or supervision about any incident between Johnson and Fairley. She testified that conversations of a sexual nature are common among some employees. She testified that Johnson was with Fairley every day and it was so common, she did not pay any attention to it. Employee Cynthia Bonner testified that on one occasion when she bent over Johnson tried to slip his hand down her shirt but she pushed his hand away. Former employee Brenda Fudge testified she worked for Johnson in the packing department and quit in 1989. In June 1990 she had a conversation with Dupre when she was rehired. Dupre asked her why she had resigned previously and she told Dupre she was under pressure and felt Johnson had made a pass at her. In answer to a question, she testified she had not said that Johnson had tried to feel her up. She later testified on cross-examination that she told Dupre the work was hard and ''I had got hit on by Billy (Johnson).''

Respondent also called Mel Dupre, the former personnel manager at Respondent's Hattiesburg plant from January to December 1990 when he resigned to accept another position. With respect to the discharge of Johnson, Dupre testified that on the date of the discharge there was an emergency telephone call for a maintenance mechanic and he could not locate him through the call system so he left his office and went looking for him in the refrigeration area which is adjacent to the box fabrication area. He testified, ''There were two women who would fold boxes on each side and send them up a conveyer and Billy Johnson was standing behind one of those people, and his back was to me as I walked up, and her back was to me also.'' The individual whom Johnson was standing behind was Annette Fairley and across the way was Connie Richardson who was facing him. ''As I walked up, I noticed that Billy Johnson had his hand down Annette Fairley's pants.'' Questioning by Respondent's counsel and answers by Dupre continued:

> Q. What was he doing?
> A. He seemed to be massaging her buttock.
> Q. Did you say anything to him at that time?
> A. No, I didn't. When he saw me he pulled his hand out and acted as though nothing happened.
> Q. Did he say anything to you at that time?
> A. No.

Dupre testified further that he regarded this as a serious matter and waited until Vice President Scott Varner, who was coming in that day, arrived and discussed it with him and a decision was made to discharge Johnson. Dupre testified he had never observed any similar conduct by a supervisor. Dupre testified there had been previous allegations of sexual harassment by ''hugging people on the line or rubbing up against them, or talking dirty to them, that kind of thing—these were investigated and not substantiated.'' Dupre denied ever having asked Johnson to plant property on any employee. He testified there was no reason for Johnson's termination other than his conduct observed by Dupre with Fairley.

On cross-examination, Dupre was questioned concerning Supervisor Luke Moody who was transferred from the vacuum pack area to the knife line following allegations by sev-

eral employees under his supervision that Moody had engaged in sexual harassment of certain of the female employees by sexually explicit comments and giving certain of them credit for time worked that they did not work and allegedly soliciting sexual favors in return. After a lengthy investigation conducted by Dupre and Second Processing Supervisor Sanders of the allegations involving discussion with all parties including Moody who denied the charges, Dupre testified he and Sanders concluded they believed Moody. Dupre was unable to verify improprieties on the timecards. Dupre told Sanders that Moody probably did not yet identify himself as a supervisor and may have tried to protect some of the employees and did not know how to keep them in line and discipline them and after consultation with Plant Manager McDonald they decided to move Moody to the knife line on Dupre's recommendation to McDonald that Moody had a good record and they wanted to retain him. He did not personally observe Moody engage in any improper conduct.

The Respondent called Malcolm McDonald, the Hattiesburg plant manager, and questioned him concerning the discharge of Johnson. McDonald testified that on May 2 he brought Johnson into his office with Sanders present and ''I said, Bill, I said, management decided it would be better off without your employment, and you would be better off unemployed here. He said, 'What?' I said, Yes, I said, We are letting you go.'' ''And he said, 'Well,' he said, 'what can I say?' I said, Well Billy, you have been a good supervisor. I said, You haven't ever given me any trouble. I said, You have been a good supervisor and you have been good with people, I said, if you ever need a reference, I said, let me know.'' ''He said, 'Well,' he said, 'I appreciate it.' And he got up and he said, 'but really,' he said, 'why are you all terminating me?' I said, Well, Bill, I don't think you want to discuss it. He said, 'Yes.' He said, 'Why are you all letting me go?''' ''I said, Well Bill, it is women is the reason we are letting you go. He said, 'Women?' I said, Yes, women. He said, 'What are you talking about?' I said, Well, Bill, I really don't think you want to discuss it. He said, 'No, I don't.''' ''And he said, 'Well what about my severance pay?' I said, Well, you know, I don't know. He said, 'Well, you all— everybody else you have ever let go, you give them 2 weeks severance pay.' I said, Yes, I said, I will tell you what I will do. I said, I will see if I can't get Mr. Varner to give you 2 weeks severance pay.'' ''He said, 'Well, if you give me 2 weeks severance pay you won't hear any more out of me.' I said, Well Bill, I can't promise whether I can get you 2 weeks or not. I said, but I will try to get you 2 weeks severance pay.'' McDonald testified he then called Varner and obtained a check for 2 weeks' severance pay and sent it to Johnson. McDonald testified he does not believe Sanders said anything during the meeting with Johnson. He denied telling Johnson that Varner told him to fire him and that he McDonald did not know why. He told Johnson he was one of the best supervisors he had ever had. On cross-examination McDonald testified that when he referred to women in his discharge of Johnson, he was referring to the following:

> Johnson came to us 10 years ago. He was an outstanding employee. Then people came to me in the plant and told me he had been seen with ladies. Then I saw him friendly with a lady in further processing, sitting and talking.

He testified that employee Johnnie C. Jones came to him in 1988 and said she saw Johnson eating dinner ''with a colored woman'' ''and I says, You are kidding.'' ''She said, 'No,' she said, 'I did.' And I said, Well, nothing I can do about it.'' Subsequently, another employee told him ''that Billy had some pictures made with a lady. He seen the pictures, she worked on the eviscerating line at the time.'' Subsequently in late 1989 or early 1990, Supervisor Tom Thorla told him that one of the ladies who worked for Thorla had moved in with Johnson and was sharing utilities. She quit approximately 6 weeks after this. McDonald further testified, ''We don't terminate people on hearsay, but it was the talk of the plant.'' He did not ask Johnson about it. McDonald testified further that ''the final instance that got Johnson's job'' was when Varner and Dupre came to his office and said we are going to have to let Johnson go. ''I said, What? They said, 'We caught him with his hands in a lady's pants in the box room.' I said, Well, if you all done that, he needs to be let go. And they said—Mr. Dupre said, well, we sure did.'' ''And I said, Well, I am the plant manager here; it is my responsibility. I said, I will take care of it, I said, I will let him go.'' Throughout his testimony McDonald maintained there was a written rule prohibiting the dating of employees by supervisors. He was referring to the Respondent's policy manual, I noted on the record that the manual does not refer to supervisors specifically.

Annette Fairley was recalled by the General Counsel and testified that Johnson never touched her breasts. She acknowledged that about once or twice a month Johnson would pat her on the buttocks and comment that she had ''a big butt.'' She testified she thought nothing of this and it did not affect her in any way. She denied ever having touched Perry Tisdale's penis or ever having grabbed him from behind and making motions as though engaged in sexual intercourse (''screwing the bootie''). On cross-examination, she testified she did not remember if counsel for the Respondent asked her at the time she initially testified in January whether Johnson had touched her breasts or not.

Johnson was also again called to the stand by the General Counsel on rebuttal and testified he did not on any occasion try to touch Cynthia Bonner's breasts and he did not on any occasion touch Annette Fairley's breasts. He has on occasion patted Annette Fairly on the buttocks ''as you would a friend.'' Nothing else took place. Diane Dawkins came up behind him in the box room and ''reached her hand real quickly through the slit (in his lab coat) and did grab my penis, and grabbed the front part. She removed her hand. She took it out, and then she laughed about it. She went around telling everybody how big it was.'' ''I told Diane to stop, because it made me mad.'' He denied having told McDonald at the time of his discharge that if the Respondent gave him 2 weeks' severance pay, the Respondent would not hear anything more from him. McDonald did not tell him at the time of his discharge that it was because of women. He did not tell McDonald that he really did not want to hear the reason for his discharge or words to that effect. He asked McDonald the reason for his discharge and McDonald said he did not know, but Scott said to let him go. He reasserted that Brenda Fudge is a former employee who worked for him for awhile,

that he never made any sexual advances toward her and that as he is presently the manager of A. J. Rental, he sees her every month as she rents her furniture there. He testified additionally that he saw her about 2 weeks after the initial hearing in January in this case at which time he had seen her in the building where the hearing was held. She told him she did not know he was suing Respondent. He told her it was an NLRB hearing. She told him she hoped he got those ''sons of bitches,'' that she had gone back there last summer and asked to speak to him, and they said he wasn't there any longer and the personnel manager with the glasses asked if she knew anything on Johnson. Johnson testified she told him she needed a job and knew it was difficult to be rehired, but if you made a sexual harassment excuse that would throw a different light on it, and that she told Dupre that Johnson had made a pass at her and that was the reason she quit. Johnson testified she apologized, told him it was a lie, and that she wasn't going to testify at the hearing. Johnson told her he appreciated it and that was the end of the conversation.

James Sanders, the supervisor over second processing and Johnson's immediate supervisor, was called to testify by Respondent and questioned concerning the allegations of sexual harassment against Supervisor Luke Moody and the investigation of the matter by himself and Dupre. He testified that when he got Moody and the women involved in the same room to discuss the allegations which Moody denied, there were a lot of accusations and denials back and forth and the women's stories fell apart and were not near as convincing as before. He also found no evidence of tampering with the timecards. He and Dupre concluded there was no merit to the women's allegations and took no further action. Sanders was not questioned regarding the discharge of Johnson.

Analysis

The General Counsel, in brief, contends that later in the day on May 3 following Johnson's submission of only a partial list of employees wearing union buttons, he was called into McDonald's office and discharged and that ''Johnson's credible testimony shows that McDonald told Johnson that Varner said to fire him but McDonald did not know the reason.'' ''McDonald commended Johnson for his skills with working with people. Johnson left the premises without being advised by any agent of Respondent any reason for his discharge or even being asked any question concerning any aspect of his conduct or performance. Johnson later learned that Respondent claimed its discharge of him was based upon his having his hand in Annette Fairley's pants.'' ''Johnson denied having his hand in the pants of Fairley. She corroborated his testimony.''

The General Counsel contends that ''Respondent's assertions regarding what was said during the course of the discharge conversation in dispute are critically impaired by its failure to question its agent Sanders about that matter, thus giving rise to an adverse inference,'' citing *International Automated Machines*, 285 NLRB 1122 (1987). The General Counsel contends that ''Johnson was a far more trustworthy witness than McDonald'' and that the enlargement of the grounds for the decision to discharge Johnson given by McDonald over the reason asserted by Varner show that Respondent's defense is riddled by shifting reasons for the discharge. The General Counsel contends that Johnson's dating of black women and cohabitation with a black woman were not the reason for his discharge notwithstanding Johnson's subjective belief as Respondent had knowledge of this for 4-1/2 years and took no action to discharge Johnson because of it and that ''The remarks made to Johnson by other agents of Respondent concerning upper management's racist views at most reflect a feeling that Johnson's chances for advancement with Respondent would be impaired by his personal life or an effort to intimidate Johnson into falling into line with Respondent's illegal campaign against the Union by calling Johnson's attention to the costs involved with failing to do Respondent's bidding.'' The General Counsel further contends that the record shows that ''Varner, in conjunction with Dupre, made the decision at issue. Their unequivocal testimony further shows that their decision was solely attributed to a pretextual assertion, at a time coming hard on the heels of Johnson's submission of a mere partial list of employees wearing union buttons, as the latest of a series of his refusals to make common cause in the unbridled commission of unfair labor practices.'' The General Counsel contends that Johnson's subjective assessment of the reason for his discharge is irrelevant as a matter of law. The General Counsel contends that Dupre was an untrustworthy witness referring to his account of the investigation and conclusion allegedly reached with respect to Supervisor Luke Moody and that a reading of Dupre's account of the Moody matter ''is enough to lay to rest any scintilla of lingering doubt that Dupre is not credible and his assertions regarding Johnson's conduct are not believable.'' The General Counsel cites for the principle of law that the discharge of a supervisor because of his refusal to commit an unfair labor practice is violative of the Act. See *Parker-Robb Chevrolet*, 262 NLRB 402, 404 (1982); *Country Bay Machets*, 283 NLRB 122 fn. 2 (1987); and *Phoenix Newspapers*, 294 NLRB 47 (1989). The General Counsel concludes that there can be no doubt that the Respondent's stated reason for the discharge of Johnson ''was false'' and that ''the surrounding facts tend to reinforce'' the inference that the motive for Johnson's discharge was his ''repeated refusals to fully serve Respondent in its pervasive unlawful plan to crush employee support of the Union,'' citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 479 (9th Cir. 1966). The General Counsel thus contends that the record establishes that Johnson's discharge by Respondent was violative of Section 8(a)(1) of the Act.

With respect to the question of reinstatement, the General Counsel contends that the applicable legal standard for foreclosing reinstatement ''requires a showing of 'flagrant' severity, entailing violence or misdeeds so opprobrious as to be indefensible'' citing *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 12 (1963); *Family Nursing Home*, 295 NLRB 923 (1989). The General Counsel notes that at the hearing the Respondent contended it had discovered during its trial preparation that Johnson during his tenure at Respondent had engaged in various acts of sexual harassment so opprobrious that they justify his disqualification from reinstatement. The General Counsel contends this ''assertion is sham.'' The General Counsel contends that the testimony of box room employee Perry Tisdale that on several occasions he saw Johnson touch Annette Fairley's breasts and buttocks and that on another occasion Fairley touched Tisdale on his penis should not be credited as it was credibly denied by Johnson and Fairley. The General Counsel contends that the testi-

mony of box room employee Ollie Wilson that on one occasion she saw employee Diane Dawkins put her hand through a slit in the lab jacket that Johnson was wearing and laughingly describe the size of Johnson's penis is ''devoid of putative value—showing only that Johnson was the victim of a crass act against him,'' in view of Johnson's unrebutted testimony that he told Dawkins to stop. The General Counsel contends that Bonner's testimony that Johnson tried to reach his hand down her shirt was credibly denied by Johnson and her testimony consisted ''entirely of generalized characterization alone—as she responded solely in subjective terms, as she purported to describe what Johnson 'tried to do,' not any actual act or physical motion that he in fact performed.'' The General Counsel contends that ''Fudge gave wholly conclusionary testimony that Johnson 'made a pass' at her or 'hit on' her.'' The General Counsel contends that Johnson gave straightforward and responsive testimony, while ''Fudge sought to testify outside the presence of Johnson in the absence of any legitimate basis'' and concludes that Fudges' testimony was ''not worthy of probative value or credence.'' The General Counsel contends that the testimony of Dupre concerning the issue of Johnson's reinstatement ''was comprised wholly of hearsay assertions, concerning his interview of applicants for rehire Fudge and Diana Smith.'' The General Counsel concludes that ''Respondent's assertions regarding Johnson's conduct are hollow and contrived.''

The General Counsel called several witnesses to demonstrate what he contends was ''the sexually permissive atmosphere at Respondent's plant.'' Employee Temple testified and identified several cartoons depicting sexually explicit obscene acts and caricatures which were distributed to her by certain of Respondent's supervisors. Former Office Manager Carol Bullock who was office manager from 1981 to 1988 testified concerning the conduct of Supervisor Otha Hinton ''in telling gross, sexually explicit jokes in the presence of her and other female personnel in the office, while also physically molesting female clerical employees, with no relief being given by Respondent,'' although she ''repeatedly unsuccessfully complained to McDonald'' about it. The General Counsel cites the testimony of James Shows who had been employed in 1988 and who testified that he was forced to quit because of the actions of employee Willie Moody who ''repeatedly, daily grabbed him by the hips when Shows bent over to pick up a box for shipping, and 'humped' him, 'like two dogs' and placed a piece of paper on his back that said 'Willie's girl,''' which was done with the knowledge of Respondent's supervisors ''to whom he complained, with no relief.'' The General Counsel also cites the testimony of employee Patricia Walker that in March 1989, First Processing Supervisor Chandler made lewd comments to her concerning her coworker and that ''on or about January 23, 1991, she observed admitted Supervisor Ora Mae Marshall sitting across from Chandler with her foot in his crotch.'' The General Counsel also cites the testimony of employees Sharon Holloway and Annette Strickland that their ''supervisor Luke Moody engaged in a long course of misconduct entailing his crediting female employees employed under his supervision with time that they did not work while expressly seeking, as quid pro quo, sexual favors from them—requested in gross language.'' The General Counsel notes that after its investigation ''Respondent's response was to simply reassign supervisor Moody to the supervision over a different department.''

The Respondent, in its brief, contends that Johnson was terminated after Personnel Manager Dupre observed him with his hand down the pants of Annette Fairley, an employee who reported to him and was observed rubbing her buttocks. It notes Dupre's testimony that when Johnson observed Dupre he pulled his hand out and acted as though nothing had happened. It also notes Johnson's testimony on cross-examination that he was warned by Richardson of Dupre's approach and said ''f—k Dupre'' with his only explanation for this comment being that he had ''nothing to hide'' Respondent's counsel argues that since this was a serious matter involving a member of supervision Dupre wanted to discuss the matter with Varner who was scheduled to be in the office later that day and that when Dupre told Varner of this and confirmed it, the decision was made to terminate Johnson. Respondent contends Fairley was not asked about this incident other than to be told after Johnson's discharge that it was a management problem since her denial would not have changed management's decision as her concurrence had no bearing on Respondent's potential liability as Johnson's actions were a violation of Federal law and were sufficient grounds for termination in any workplace. Respondent contends that Johnson's assertion that he was discharged because he refused Dupre's request that he plant company property on employees Temple and Cole is ridiculous as Dupre has over 15 years' experience as a personnel director and has been involved in several union campaigns where he trained supervisors not to violate the Act and he is also well versed in the law of sexual harassment.

Respondent further contends that Johnson's testimony was contradictory as he acknowledged telling the EEOC that he believed the decision to terminate him was made in September 1989 well before Dupre's request of Johnson and even before Dupre was hired by Respondent. Johnson also acknowledged having told the EEOC that Dupre was ''only too happy'' to help Varner find ''anything'' for his dismissal because of an incident on May 1 or 2 when Dupre withheld money from the checks of two employees who owed the Respondent money as Johnson testified:

> I went directly to the manager, McDonald, and informed him of this. I believe he really got on Dupre for this . . . which only could mean that Dupre was only too happy to help Varner To find anything for my dismissal.

Respondent further contends that Johnson's allegation contained in his unfair labor practice charge in this case filed 5-1/2 months after his dismissal is an afterthought as on August 31, 1990, he filed a charge with the EEOC alleging he was discharged because ''the Company [had] a problem with [him] dating black females.''

The Respondent further contends that Johnson's testimony during the four times he took the stand and in his affidavits' was inconsistent as on his first time on the stand, he denied having his hands down Fairley's pants or touching her breasts and he testified that he had his arm around her waist and complimented her on her diet whereas in his Board affidavit he said nothing about having his arm around her waist but said that he pinched her ''above the waist and below the

bra.'' On the first occasion he took the stand he denied engaging in any physical horseplay with Fairley. He also denied having been exposed to an employee or having been touched by other employees. He did acknowledge being forced to touch the breasts of employee Patricia Robinson back in 1985 or 1986. The Respondent further notes that in April when Johnson was called to the stand for a second time by the General Counsel after a recess of over 3 months from the hearing in January, Johnson then testified that another employee, Diane Dawkins had touched him on the penis and that Fairley observed his penis after pulling on his jogging shorts. In a second affidavit, which was given after the January hearing Johnson stated that Fairley ''may testify'' that she ''felt his privates.'' He also acknowledged ''horseplaying'' with employees Diane Dawkins and Shirley Dantzler after having denied this 3 months earlier. The Respondent contends the EEOC investigation ''flushed out several individuals who had seen Mr. Johnson commit similar acts'' pointing to the testimony of Tisdale who testified he observed Johnson touch Fairley's breasts and buttocks and the testimony of Wilson who testified ''She observed what appeared to be fellow employee Diane Dawkins playing with Mr. Johnson's penis and heard her say that she wanted to 'screw him in the backside with a rubber dick.''' and who further testified she ''saw Mr. Johnson and Ms. Fairley engage in rough horseplay, where he picked her up and threw her down on a pile of boxes, and she scratched him.'' The Respondent also contends that Johnson ''attempted to influence the testimony of the employees in the box room,'' as Wilson identified a proposed statement given to her by Johnson, which states:

> I was walking approximately 10 feet from Bill And Annette on the morning when Mel Dupre was visiting the Box Room. I have never noticed any action that is improper, immoral, or harassing.
>
> Date

Respondent notes that Johnson ''first denied and then admitted sending the above statement to all employees that worked in the box room'' and that Wilson testified Johnson originally asked her to sign a statement that she was only 3 feet away and when she did not sign that statement he sent her the above statement. Respondent also contends that Johnson's allegations in the instant case are further undermined by Wilson's testimony concerning a conversation Johnson had with her at a service station after his discharge in which Wilson testified:

> He told me that he wanted me to talk to some lady and that it didn't have nothing to do with the Union. It had something to do with his private life, and he wanted to know, did Jim Sanders or either Scott Seabrook had asked me questions about him going with them women down there.

Respondent also notes the testimony of Bonner that Johnson had tried to put his hand down her shirt. The Respondent also points to the testimony of Fairley who ''admitted he [Johnson] touched her buttocks 'once or twice' a month and told her what a big butt she had,'' and her testimony that Johnson ''made sexual comments to her on a weekly basis and talked about other females' body.'' The Respondent further contends that testimony submitted by the General Counsel after the presentation of Respondent's defense concerning evidence of improprieties by other supervisors did not rebut the Respondent's case as ''None of the alleged conduct was similar to that committed by Johnson'' and the General Counsel ''did not establish that the conduct was known or observed by members of upper management.'' Specifically, Respondent asserts that ''No other supervisor has ever fondled an employee and remained employed.'' Respondent further contends that ''the facts uncovered during the course of the EEOC investigation and from applicants Brenda Fudge and Diana Smith preclude Mr. Johnson's possible reinstatement.''

Respondent contends that ''The Supreme Court and the lower federal courts are unanimous in holding that an employer which fails to take prompt remedial action in response to evidence of a supervisor's sexual misconduct is itself guilty of sexual harassment,'' citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Jones v. Flagship International*, 793 F.2d 714 (5th Cir. 1986), cert. denied 479 U.S. 1065 (1987); and *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982). The Respondent also argues that the Board has held ''an employer does not violate Section 8(a)(3) by discharging a union activist for sexual harassment, especially where there is no evidence that the incident is a setup and no evidence of disparate treatment,'' citing *Lancer Corp*., 271 NLRB 1426 (1984). Respondent argues in the alternative that if the discharge of Johnson is found violative his ''pretermination conduct discovered subsequent to May 3, 1990, bars any claim for reinstatement or back pay,'' citing *Axelson, Inc*., 285 NLRB 862, 866 (1987); *John Cuneo, Inc*., 298 NLRB 856 (1990).

I conclude that the General Counsel has established a prima facie case that the discharge of Johnson was motivated in part because of Johnson's refusal to go the extra mile by taking adverse actions against employees under his supervision. In this regard I credit Johnson's testimony that on several occasions he was requested to take punitive actions against prounion employees and declined to do so. Specifically, I credit Johnson's testimony that he was told by McDonald to check on the work of prounion employees Cole and Temple to find a reason to discharge them and after checking on chickens they had processed he reported back to McDonald that there was no problem with their work. I credit Johnson's testimony that Dupre requested that he plant company property in the possession of prounion employees Cole and Temple and that he refused to do so. I find corroboration of Johnson's testimony in the testimony of Temple who testified that Johnson told her to ''watch her ass'' as Respondent was looking for a way to fire her and Cole who testified to a similar warning. I also credit Johnson's testimony that he refused to give a written warning to Temple after discussing with Bonner, Temple's alleged harassment of Bonner and reporting to Varner that Bonner had indicated there was no problem and his refusal to issue the warning notwithstanding Varner's demands that he do so. I also credit Johnson's unrebutted testimony that following a meeting at which Assistant Director of Human Resources Neil Keith had told the foremen to give the cold shoulder to prounion employees, he was engaged in laughter with prounion employee Temple and was chastised by his imme-

diate supervisor, Sanders, for doing so after having just attended the meeting with Keith and being told to cold shoulder the prounion employees and that he received a warning from Sanders that Varner wanted to run Johnson off anyway. I further credit Johnson's testimony that on the day of his discharge he was asked to report the names of all employees who were wearing prounion buttons but turned in less than six names after permitting employees to remove their buttons and not reporting the names of those who removed them after having initially been told by McDonald that six employees were wearing the buttons. I found Johnson's testimony to be explicit and detailed concerning these various incidents and credit it. I note also that Bonner was not questioned concerning the incident with Temple. With respect to the specific incident involving Johnson's allegedly having his hand in Fairley's pants, I credit Johnson that he did not have his hand in Fairley's pants and Fairley who corroborated his testimony over the testimony of Dupre. I note that neither party called employee Connie Richardson who was, according to both Dupre and Johnson, standing across the conveyor belt at the time when Dupre walked into the box room.

In making this determination, I have considered several factors such as Respondent's demonstrated animus against the Union, as established by a number of antiunion statements made by Respondent's representatives to Johnson and to other employees and other violations found as well as Respondent's demonstrated animus against Johnson and the warning by Sanders to Johnson concerning his being too friendly with prounion employee Temple as well as the timing of Johnson's discharge the day of the withdrawal of the Union's petition for an election. I have also considered the circumstances under which Johnson was alleged to have had his hand down the pants of Fairley and find it unlikely that he would have done this while standing immediately across from another employee. I have also considered the versions of the discharge given by McDonald and Johnson and the failure of Respondent to question Sanders regarding the discharge of Johnson by McDonald at which he was present and find that this failure by Respondent to question Sanders regarding this supports an adverse inference that his testimony would not have supported McDonald's position in this regard. I found McDonald's testimony to be unconvincing, including his attempt to embellish the reasons for Johnson's discharge by referring to earlier incidents in which he contended it was widely known in the plant that Johnson associated socially with black females. Accordingly, I credit Johnson's testimony concerning the conversation between himself and McDonald at the time of his discharge and find that Johnson was not apprised of the reason for his discharge. I further credit the testimony of Johnson concerning the comments made by Sanders after he and Johnson left McDonald's office that he and McDonald did not like what was going on with respect to the discharge of Johnson. Accordingly, I find that the General Counsel has established a prima facie case that the discharge of Johnson was motivated at least in part by Johnson's refusals to take punitive actions against prounion employees and Respondent's displeasure with these refusals by Johnson to fully carry out its unlawful goals. I am persuaded that although Johnson may have incurred the displeasure of Respondent's management because of his dating of black females and cohabiting with a black female, it was not until the advent of the union campaign and Johnson's refusals to fully carry out Respondent's unlawful requests to take punitive actions against prounion employees that Johnson was discharged. I find that the Respondent has failed to rebut the prima facie case of a violation of Section 8(a)(1) by its discharge of Johnson. *Wright Line*, supra; *Transportation Management Corp*., supra; and *Roure Bertrand Dupont, Inc*., supra. See also *Parker Robb Chevrolet*, supra; *Country Bay Machets*, supra; and *Phoenix Newspapers*, supra. Re: Discharges of supervisors.

With respect to the question of reinstatement, Respondent contends that even if its discharge of Johnson is found to be violative of the Act he should be barred from reinstatement and denied backpay as a result of a number of infractions regarding alleged sexual harassment discovered after the May 3 discharge of Johnson. In this regard, it cites the testimony of Tisdale regarding alleged instances in which Johnson touched the breasts and buttocks of Fairley, the testimony of Fairley and Johnson in which both acknowledged that Johnson regularly patted Fairley on the buttocks in a friendly manner which Fairley did not mind, the testimony of Fairley that Johnson made comments to her of a sexual nature which Johnson did not deny, horseplay engaged in by Johnson with Fairley, an instance in which a female employee touched Johnson's penis, and one instance admitted by Johnson in which an employee put his hand to her breast and he felt it. It also cites the testimony of former employee Fudge that Johnson made a pass at her and that of Bonner that Johnson attempted to put his hand down her shirt which was not reported to management and the hearsay testimony of Dupre that former employee Diana Smith told him Johnson had come on to her. I have reviewed each of these matters as well as the various matters submitted by the General Counsel, including the testimony of former Office Manager Carol Bullock concerning the conduct of former Supervisor Otha Hinton and the testimony of former employee James Shows concerning the conduct of employee Willie Moody and the testimony of Ruth Strickland, and Sharon Holloway concerning the conduct of Supervisor Luke Moody, all of which were reported to management and at least two of which (Hinton and Willie Moody) were apparently known and tolerated by management and one of which (Luke Moody) was dismissed by management after an investigation as well as the testimony of several employees that Respondent permitted an atmosphere of sexually explicit conduct including the use of a copy machine to copy sexually obscene cartoons and distribute them to employees.

Although I find that the discharge of Johnson was violative of the Act, I find that the Respondent has presented sufficient evidence to justify the denial of reinstatement to Johnson. It is well settled that sexual harassment carried out by a supervisor which is known and tolerated by an employer may subject the employer to liability, and will justify the employer's discharge of the offending supervisor. Initially I find Johnson, by his own admission, engaged in horseplay with Fairley and according to the testimony of employee Ollie Wilson, whom I credit, Johnson and Fairley regularly engaged in rough horseplay. Fairley also testified that Johnson regularly patted her on the buttocks telling her what a ''big butt'' she had and made sexual comments about other female employees such as ''she has a good body.'' I credit Fairley in this regard. Johnson admitted patting Fairley on the buttocks. Tisdale testified that Johnson frequently touched

Fairley's breasts and buttocks. I credit his testimony. Bonner testified unequivocally that on one occasion Johnson attempted to put his hand down her shirt but she brushed it away and did not report it to management. I credit her testimony. I do not rely on the testimony of Fudge which was conclusionary and lacking in specific detail as to what Johnson did when he allegedly made a pass at her. I also do not rely on the hearsay testimony of Dupre concerning the comments made by former employee Diana Smith. Nor do I rely on the incidents related by Johnson and Wilson when other employees touched Johnson's privates or in which one employee put his hand to her breast in one instance. I find that Johnson engaged in a course of conduct that constituted a basis for sexual harassment claims and that fully justifies barring his reinstatement notwithstanding other evidence of Respondent's permissive attitude toward sexually explicit conduct by its supervisors and employees in the past. I thus will recommend that he be barred from reinstatement. It is also well settled that a discriminatee may be barred from reinstatement based on evidence of other misconduct discovered subsequent to his unlawful termination by an employer. *Axelson, Inc*., supra; *John Cuneo, Inc*., supra.

I thus find that Respondent has shown that Johnson's course of conduct was such as to fully justify barring his reinstatement. No employer should be required to reinstate an employee who engages in a course of conduct of sexual harassment which may subject the employer to liability therefor. However, it appears from the evidence presented by the General Counsel and I find that Respondent permitted an overall pattern of conduct by its supervisors which would support a basis for sexual harassment claims. Under these circumstances, it is questionable whether Respondent could meet its burden of proof in showing that it would not have employed or continued to employ Johnson as set out in *John Cuneo*, supra. Its tolerance of such behavior by other supervisors and employees certainly calls into question whether Respondent would have discharged Johnson for his engagement in sexual harassment in the absence of his refusal to commit unfair labor practices. Under these circumstances, I find that to deny Johnson backpay to make him whole for his loss of earnings and benefits sustained by him as a result of Respondent's unfair labor practices would not constitute an adequate remedy to further the purposes and policies of the Act. Accordingly, I recommend that Johnson should not be reinstated but should be made whole for all loss of earnings and benefits until such time as he has obtained substantially equivalent employment elsewhere. See *Hillside Avenue Pharmacy*, 265 NLRB 1613 (1982), in which the Board fashioned a similar remedy in which the conduct of the employer in committing the unfair labor practice did not directly lead to the misconduct by the discriminatee. In the instant case, the tolerance of sexual harassment or at least the appearance of the tolerance of such behavior by its supervisors and employees permitted an atmosphere conducive to the type of misconduct engaged in by Johnson although it certainly does not excuse the misconduct of Johnson. Accordingly, I recommend that Johnson be denied reinstatement but be made whole for all loss of earnings and benefits sustained by him until he obtains substantially equivalent employment elsewhere. In this regard both the Respondent and Johnson will shoulder responsibility for their coduct.

The Alleged Unlawful Transfer to More Arduous Work, Reduction in Hours, Harassment, and Constructive Discharge of Ruth Powell

The evidence established that Ruth Powell was a long-term employee of Respondent who testified on behalf of the Union in the representation hearing of February 1990. Powell was a union supporter and on one occasion spurned an offer of an apron with the caption ''Vote No,'' which was being distributed to employees on behalf of Respondent's campaign against union representation and instead attached a legend of ''Vote Yes'' on her own apron in support of the union campaign. Powell testified that on May 23 she was reassigned from her job in the net room making nets and stapling prices which job she had been performing the last 3 or 4 years, and was assigned to make boxes in the box room by her Supervisor Bobby Boutwell who told her she would be making boxes from then on as he had kept her in the net room as long as he could. Powell was 63 years old at the time of the hearing and the net room job was a relatively nonstrenuous job which was also performed by employees who were pregnant and could no longer perform their regular jobs. The box making job requires significantly greater effort and involves the lifting and folding of heavy corrugated cardboard boxes. At the time of her reassignment to the box line, Boutwell reassigned employee Dallas Meyers who had been making boxes to the net room thus effecting a transfer of the two employees to each others' position. Powell testified she lost 10 to 15 minutes of time per day as a result of the transfer. At the time of the hearing and during all times since the transfer, Dallas Meyers has continued to be assigned to the net room according to the unrebutted testimony of former Supervisor Bobby Boutwell, who testified on the final day of the hearing in this case, having resigned from Respondent the day before. Boutwell testified that he had reassigned Powell to the box line and removed her from the net room on orders from his immediate superior, James Sanders, who had repeatedly told him to reassign Powell out of the net room and who told him on the day of the transfer to do it to keep ''his [Sanders'] butt'' out of trouble. Boutwell also testified that on a prior occasion Vice President Scott Varner had told him to get Powell out of the net room but that he had not complied with this. Boutwell testified he had resisted transferring Powell out of the net room because she did good work in the net room and he needed her there. Subsequently, on June 18 Powell was transferred to the eviscerating line as a heart and liver cutter, a job which requires constant motion. Powell had performed this job in the past. Sanders testified that he was asked by First Processing Supervisor Ken Chandler if he would permit the transfer of several employees who had experience as heart and liver cutters to the eviscerating line supervised by Chandler and that Chandler specifically requested Powell. Sanders testified that Chandler was having trouble with excessive turnover among the heart and liver cutters, because of quits and terminations of employees who could not do the job. Chandler recalls asking Sanders to permit certain of his employees to be transferred to the eviscerating line but did not specifically recall having requested Powell. As a result of the work and motion required as a heart and liver cutter Powell developed shoulder problems and was off work from June 26 to July 5. She saw a physician, Dr. Campbell, who prescribed muscle relaxants and pain relievers for her shoulder. When she returned to

work on July 5 she was reassigned to a dirty parts room where her preexisting allergies acted up and she could only remain one morning. Powell testified she had discussed the allergies with Plant Manager Malcolm McDonald previously. McDonald testified at the hearing that she had some time prior thereto recommended a doctor to him for his asthma and said that the doctor had ''straightened her out.'' On that morning she left work again with her allergic condition and her shoulder in pain stating that she would see Dr. Campbell and the Respondent's workmen's compensation doctor, Dr. Conn.

She subsequently returned once again to work on July 30 and was assigned to the washout station which involved washing out chickens which have become soiled with gall and other matter. When she asked to return to her net room job, Personnel Manager Mel Dupre told her there was no longer a net room job. Dupre and Chandler also carried on a conversation about her as if she were not present with Dupre contending he did not know what to assign her to do and Chandler contending there was nothing for her to do except cut hearts and livers which was the job that had resulted in her shoulder problems. Powell testified that on August 3 Dupre and Chandler met with Powell and showed her a letter asking if Dr. Conn had written it. Dr. Conn examines Respondent's employees for work related injuries. Powell had previously been examined by him. Powell replied she did not know if Dr. Conn had written the letter. Dupre asked her several times whether her previous job was cutting hearts and livers. Powell replied it was working in the net room. Dupre then said he was taking her off of workmen's compensation which she had been on for her injury to her shoulder and would tell Dr. Conn that she had said she could do anything in the plant. Powell testified she told Dupre she was going to see Dr. Conn the next week and would not return to work until that time. Powell testified she returned to the wash tank although feeling ill. At the end of her workday she sought out Dupre and asked him for a copy of the letter as she doubted it had been written by Dr. Conn. She testified Dupre initially agreed but was stopped by McDonald and both entered McDonald's office. When Dupre came out of McDonald's office he handed her a piece of paper. Powell left the plant and prior to getting in her car she read it and felt it was not the same document Dupre had read to her in the meeting. She returned to the office and confronted Dupre and he contended it was the same letter whereas she contended it was not. During this conversation Dupre said he had never been on welfare, food stamps, or workmen's compensation. Powell said she had worked for Respondent for 30 years, that she had never previously been on workmen's compensation and that it was her money. Obery who was in the office agreed with her, concerning it being her money. Powell then said she might as well leave as she could not get anywhere with Dupre. Dupre then asked Powell who is 63, her age, and when she declined to tell him, he spoke in a low voice and said, ''You are just senile,'' Dupre denied the version of the conversation by Powell, Obery did not testify, I credit Powell's version.

Powell left work on August 3 and saw Dr. Campbell who recommended she seek treatment at the Pine Belt Mental Health Services in Hattiesburg, Mississippi, for severe anxiety and depression about her job, which she did. Subsequently, Dupre spoke to Powell's daughter and asked her to have Powell call him about returning to work. On August 21, Dupre wrote Powell telling her to contact him within 2 weeks about returning to work or she would be considered to have quit. Powell's personal attorney, responded on her behalf on September 4 by letter informing Respondent that Powell was undergoing treatment for depression and anxiety related to her job and was temporarily totally disabled. Respondent did not contact her attorney but again wrote Powell on September 7 informing her she should contact it by September 12 or be terminated. Powell who was undergoing treatment did not further reply and was terminated on September 17.

Analysis

The General Counsel contends that Powell, a 63 year old lady, was transferred from her job in the net room (a relatively nonstrenous job which she had performed for the last 3 or 4 years) to several more arduous and unpleasant jobs in the box making room, on the eviscerating line, in the parts room and at the washout station, in retaliation for her support of the Union because of her giving testimony at the representation hearing in February 1990 and her support of the Union and that these reassignments to arduous and unpleasant work and the verbal abuse directed against her by Respondent's management (particularly Personnel Manager Dupre) made her work so intolerable as to effect her constructive discharge or in the alternative that she was discharged by Respondent. The Respondent contends that it has not discriminated against Powell but that the net room job disappeared as a result of a decrease in orders for whole chickens which was caused by the loss of its National Food store account and that the other jobs assigned to her were relatively easy jobs and that it made reasonable efforts to accommodate Powell but that she voluntarily quit after numerous efforts of Respondent to contact her concerning her return to work. It also relies on testimony of Robert Boutwell and Sanders that other employees in the net room became upset with things Powell had said to them in the net room.

I find that the General Counsel has established a prima facie case that the Respondent assigned Powell to more arduous and unpleasant jobs and transferred her from the net room job resulting in a reduction of time at the end of the day and ultimately as a result of this and verbal abuse by Respondent's agents made her continuation of work so intolerable that she was forced to quit her job thus effecting her constructive discharge. The record supports the finding that Powell abandoned her job as a direct result of Respondent's discrimination against her. In the event the Board finds Powell was not constructively discharged, I find also that the September letter of Respondent supports a finding that she was discharged by Respondent. In either event, I find that these acts of retaliation were taken against her because of her support of the Union in violation of Section 8(a)(3) and (1) of the Act and because of her giving testimony on behalf of the Union at the representation hearing in violation of Section 8(a)(4) and (1) of the Act. I found Powell to be a credible witness. I also found Boutwell to be a credible witness who, although he took great pains not to unduly assess Respondent's motivation, told the truth and refuted Respondent's management's contentions that the net room job no longer existed as a full-time job. I do not find Respondent to have acted out of concern for Powell or its business oper-

ations but rather to have driven her out of her job. It may well be that Powell, a 63 year old woman, had a predisposition to depression and anxiety although nothing in the record establishes this. However, it is readily apparent that Respondent's unbending efforts to remove her from her net room job and assign her to other jobs notwithstanding her difficulties encountered were contrived and carried out to harass a known union adherent who had been open in her support of the Union and had resorted to Board process by testifying on behalf of the Union. While these actions might or might not have similarly affected another employee so as to constitute a constructive discharge, they were sufficient to do so here. As stated above in the event the Board does not agree with a finding of constructive discharge, I find that she was at a minimum unlawfully discharged by Respondent in September 1990 as Respondent had been put on notice by her attorney and by Dr. Campbell that she was suffering from anxiety and depression. I have thus concluded that the Respondent has failed to rebut the prima facie case of a violation of the Act by the preponderance of the evidence. *Wright Line*, supra; *Transportation Management Corp*., supra; and *Roure Bertrand Dupont, Inc*., supra. See also *Crystal Princeton Refining*, 222 NLRB 1068, 1069 (1978); *Kime Plus*, 295 NLRB 127 (1989); and *Bennett Packaging Co*., 285 NLRB 602 (1987). Re: Constructive discharge.

The Threat Issued to Supervisor Barnes

Supervisor Billy Ray Barnes testified that in December 1990 and subsequently on January 10, 1991, the last workday preceding the opening of the hearing in the instant case on January 11, 1991, First Processing Supervisor Chandler to whom Barnes reports, inquired whether Barnes was ''going with'' an employee stating that he had heard rumors of this. Barnes who has been cohabitating with employee Annette Fairley for approximately 4 years denied that he was ''going with'' an employee. Chandler then told him Respondent had a policy prohibiting supervisors from going with or staying with employees and he could be terminated for doing so. Barnes testified that prior to this he had never been questioned concerning his association with Fairley whom it will be recalled was the alleged victim of purported sexual harassment by Johnson giving rise to his discharge. The only written policy introduced in evidence concerning anything remotely near to the alleged prohibition about which Chandler warned Barnes was Respondent's policy of May 1, 1988, entitled ''Employment of Relatives'' which permits the employment of relatives but prohibits employees from supervising their relatives. It was stipulated that Barnes and Fairley have never worked in the same department. Chandler who was called by Respondent admitted he had spoken to Barnes concerning the alleged rumors and did not deny having threatened Barnes, although he did deny any knowledge that Fairley would testify at the hearing. Plant Manager McDonald also contended that Respondent had a policy prohibiting supervisors from dating employees which he contended was contained in the provision entitled ''Sexual Harassment.'' Respondent also offered a letter dated October 18, 1990, from the area office of the Equal Employment Opportunity Commission (EEOC) in which that office informed Respondent it had information that Fairley and Barnes lived together and Respondent's letter of October 23, 1990, responding that this would ''be looked into immediately.'' Barnes who testified he mentioned these inquires of Chandler to Fairley testified she did not respond.

Analysis

The General Counsel contends that the inquiry and threats made by Chandler to Barnes were calculated to influence or prevent the testimony of Fairley on the Johnson discharge matter by coercing Barnes to coerce Fairley. I conclude that this is exactly what was intended and the obvious purpose of Chandler's inquiry and threats. In making this determination, I rely on the complete absence of any written rule prohibiting social relationships between supervisors and employees, the remoteness in time of the inquiry by the EEOC in October which was also in an unrelated context concerning the race of Barnes and Fairley, the timing of the inquiries and threats by Chandler shortly and immediately before the start of the hearing in this matter, and the obvious knowledge that may be inferred to Chandler as one of the highest management officials at this plant of the likelihood of Fairley being called as a witness in this matter. I thus find that the threat toward Barnes was violative of Section 8(a)(1) of the Act as it was calculated to interfere with Fairley's protected right to testify in this hearing. See *Orkin Exterminating Co*., 270 NLRB 404 (1984); *Professional Eye Care*, 290 NLRB 738, 748 (1988). Re: Protection of the Act precluding retaliation against supervisors because of their refusal to commit unfair labor practices. See *NLRB v. Schriver*, 405 U.S. 117 (1972). Re: Public policy considerations for the protection of free employee access to Board process.

CONCLUSIONS OF LAW

1. The Respondent, Marshall Durbin Poultry Company, is now and has been at all times material an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers International Union, AFL–CIO is now and has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent acting through its plant manager, Malcolm McDonald, violated Section 8(a)(1) of the Act by

(a) On or about late January or early February 1990 interrogating employee Ruth Powell regarding her union membership, activities, and sympathies and those of her fellow employees.

(b) On or about February 19, 1990, informing its employee Rebecca Cole that it would be futile for the employees to select the Union as their bargaining representative.

(c) On or about February 28, 1990, threatening employee Rebecca Cole with discharge because of her activities on behalf of the Union.

(d) On or about May 2, 1990, threatening to discharge employee Barney Chisholm if he disclosed the contents of a conversation with him regarding his being barred from the plant premises after working hours by Respondent's management.

4. Respondent violated Section 8(a)(1) of the Act acting through its vice president, Scott Varner, by

(a) On or about late January and March 1990 threatening its employees with plant closure if they selected the Union as their bargaining representative.

(b) On or about February 26 and mid-March 1990 threatening its employees with reduced wages and benefits if the Union was selected as their bargaining representative.

(c) On or about mid-March 1990 threatening its employees with reduced benefits if the Union was selected as their bargaining representative.

5. Respondent violated Section 8(a)(1) of the Act by and through its supervisor, Billy Johnson, by

(a) On or about late February 1990 telling employees Rebecca Cole and Myrtle Temple that Respondent's plant manager, Malcolm McDonald, had ordered him to check their work to find fault with it in order to discharge them.

(b) On or about March 1, 1990, soliciting its employees to withdraw their support of the Union and promising them job security if they demonstrated to Respondent that they had done so.

(c) On or about March 16, 1990, telling its employees that if they withdrew their support of the Union, they would save their jobs.

(d) On or about late April or early May 1990 informing its employees Respondent had instructed him to harass them because of their engagement in union activities.

(e) On or about April 20, 1990, informing its employees Myrtle Temple and Rebecca Cole that Respondent's personnel manager, Mel Dupre, had instructed him to plant Respondent's property on their person in order to accuse them of stealing in order to discharge them.

(f) On or about May 3, 1990, informing its employees that Respondent was making a list of its employees who wore union insignia.

6. Respondent violated Section 8(a)(1) of the Act through its supervisor, Robert Gaines, by informing its employees that their raises were withheld because of their activities on behalf of the Union.

7. Respondent violated Section 8(a)(1) of the Act by and through threats of discharge issued by Supervisor Ken Chandler to Supervisor Billy Ray Barnes in late December 1990 and on or about January 11, 1991, in order to restrain employee Annette Fairley from testifying in this hearing.

8. Respondent violated Section 8(a)(1) of the Act by and through various supervisory personnel, including William (Billy) Johnson, Robert Boutwell, and James Gurlach who interrogated its employees regarding their union membership, activities, and sympathies.

9. Respondent violated Section 8(a)(3) and (1) of the Act by since on or around late April and early May 1990 disparately prohibiting employee solicitation activity on its premises by permitting antiunion activities while prohibiting prounion activities engaged in by its employees

10. Respondent did not violate Section 8(a)(3) and (1) of the Act by on or about February 1990 delaying the conferral of a wage increase plan on its employees.

11. Respondent violated Section 8(a)(3) and (1) of the Act by on or around March and April 1990 reducing the workweek of its employees at its Hattiesburg, Mississippi plant.

12. Respondent violated Section 8(a)(3) and (1) of the Act by in or about May 1990 refusing to allow its employee Barney Chisholm to stay in the breakroom or its parking lot premises at its facility beyond his working hours, and by issuing him a written reprimand for remaining on the premises.

13. Respondent violated Section 8(a)(3), (4), and (1) of the Act by on or about March 22, 1990, decreasing the hours of its employees Myrtle Temple and Rebecca Cole. It did not violate the Act by decreasing their hours in January 1990.

14. Respondent violated Section 8(a)(3), (4), and (1) of the Act by on April 12, 1990, by issuing a written warning to its employee Myrtle Temple.

15. Respondent violated Section 8(a)(3), (4), and (1) of the Act by on April 30 and May 17, 1990, by issuing written warnings to its employees Rebecca Cole and Myrtle Temple.

16. Respondent violated Section 8(a)(3), (4), and (1) of the Act on April 6, 1990, by issuing a written warning to its employee Patricia Walker.

17. Respondent violated Section 8(a)(3), (4), and (1) of the Act by on or about May 23, June 18, and August 2, 1990, assigning more onerous work to and decreasing the hours of its employee Ruth Powell and by harassing her on or about August 2, 1990.

18. Respondent violated Section 8(a)(3), (4), and (1) of the Act by on or about September 17, 1990, causing the termination of its employee Ruth Powell.

19. Respondent violated Section 8(a)(3), (4) and (1) of the Act by on or about April 10 and 30 and June 18, 1990, issuing written warnings to its employee Charlene Jones, and by on or about June 18, 1990, issuing warnings to its employees Gussie McGilvery and Cecilia Hayes.

20. Respondent violated Section 8(a)(3), (4), and (1) of the Act by on or about June 18, 1990, discharging its employee Charlene Jones.

21. Respondent violated Section 8(a)(1) of the Act by discharging its supervisor, William (Billy) Johnson, on May 3, 1990, because of his refusal to commit unfair labor practices and in order to discourage its employees from joining, supporting, and assisting the Union or engaging in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

22. The aforesaid unfair labor practices as found herein in conjunction with the status of the employer as found above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated the Act, it shall be ordered to cease and desist therefrom, and to take certain affirmative actions including the posting of an appropriate notice, designed to effectuate the purposes of the Act. Respondent shall rescind its unlawful warnings issued to its employees, Barney Chisholm, Myrtle Temple, Rebecca Cole, Patricia Walker, Charlene Jones, Gussie McGilvery, and Cecilia Hayes. Respondent shall rescind its unlawful termination of its employees, Charlene Jones and Ruth Powell, and its unlawful reduction in work hours, and transfer of its employee Ruth Powell and offer them full reinstatement to their former positions (including reinstatement to her former position in the net room in the case of Ruth Powell), or to substantially equivalent positions if their former positions no longer exist, and make them whole for all loss of pay and benefits, including seniority and other rights and privileges sustained by them as a result of Respondent's unlawful discrimination against them by reason of their discharge and by reason of its transfer and reduction of work hours of Ruth Powell. Respondent shall also make whole Rebecca Cole and Myrtle Temple for all loss of pay and benefits sustained by them as a result of Respondent's unlawful decrease in their

work hours in March 1990 and thereafter and shall make whole its employees at its Hattiesburg plant for all loss of pay and benefits sustained by them as a result of Respondent's unlawful decrease in their work hours in March and April 1990 as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950). Backpay and benefits shall be with interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[2] Respondent shall rescind its unlawful discharge of former Supervisor William (Billy) Johnson. Reinstatement is not recommended in the case of Johnson as a result of the opprobrious conduct found to have been committed by him prior to his discharge but discovered subsequent to said discharge, but Respondent shall be ordered to make him whole for loss of backpay and benefits with interest until such time as he has found substantially equivalent employment. Respondent shall also expunge its records of all references to the unlawful warnings issued to employees Barney Chisholm, Myrtle Temple, Rebecca Cole, Patricia Walker, Charlene Jones, Gussie McGilvery, and Cecilia Hayes, of all references to the unlawful discharges of its employees Ruth Powell and Charlene Jones and to its discharge of William (Billy) Johnson, and inform each of the above-named employees in writing that such unlawful actions shall not be used against them in any manner in the future. Respondent shall also preserve all necessary records for backpay and benefits and make them available to the Regional Director for Region 15 or his representatives. As a result of the widespread and egregious unlawful acts committed by the Employer, I recommend a broad cease-and-desist order.

[Recommended Order omitted from publication.]

[2] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6624.